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IN THE

Supreme Court of the United States

October Term, 1968

No. 498

NEWARK STEREOTYPERS' UNION NO. 18,
Petitioner,

v.

NEWARK MORNING LEDGER CO. AND NEWARK NEWSPAPER PUBLISHERS' ASSOCIATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered June 18, 1968.

Opinions Below

The District Court's opinion (15A)[1] is reported at 261 F. Supp. 832. The opinion of the Court of Appeals for the Third Circuit (4A) is not yet reported.

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[1] Parenthetical numbers followed by the letter "A" refer to pages of the Appendix to this petition. Such numbers followed by the letters "a" and "c" refer to the Appendices to petitioner's main and reply briefs, respectively, in the Court of Appeals, while numbers followed by the letter "b" refer to the respondents' Appendices in the Court of Appeals.

Jurisdiction

The judgment of the Court of Appeals was entered June 18, 1968 (14A). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

In the arbitration of a labor dispute ordered by the District Court in an action under the Labor-Management Relations Act, where petitioner's expert witness refused to continue his direct testimony and to testify to the reasons for his refusal and the arbitrators refused to hear evidence that his silence was wrongfully induced by respondents and others:

1. Whether petitioner was denied due process under the Federal Constitution and a fair hearing under the Labor-Management Relations Act and the United States Arbitration Act.

2. Whether "the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy" and of "any other misbehavior" by which petitioner's rights were prejudiced within the proper construction of § 10 of the United States Arbitration Act.

3. Whether, in affirming the District Court's denial of a hearing of the claim that the award had been procured by "corruption, fraud or undue means," the Court of Appeals sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Federal Constitutional Provisions and Statutes Involved

The case involves the Due Process Clause of the Fifth Amendment; § 301 of the Labor-Management Relations Act (61 Stat. 156, 29 U.S.C. § 185); and § 10 of the United States Arbitration Act (61 Stat. 669, 9 U.S.C. § 10). These provisions are printed in the Appendix (1A-3A).

Statement of the Case

Petitioner commenced this action under the Labor-Management Relations Act and the United States Arbitration Act to compel arbitration of a dispute as to the number of men to be assigned to the "M.A.N." stereotype plate-casting machine at the plant of respondent Newark Morning Ledger Co.[2] Petitioner claimed two men were needed, while respondent contended one man was sufficient. On petitioner's motion, the District Court granted summary judgment declaring the dispute arbitrable, directing arbitration and appointing a chairman of the arbitration panel ("the Committee") which also included four other members, two named by petitioner and two by respondent.

At the arbitration hearings petitioner's expert, Pezdirtz, was called to state his opinion that the M.A.N.'s proper operation required at least two men. At that time he was employed by Wood Newspaper Machinery Corporation ("Wood"), and appeared pursuant to petitioner's arrangements with Wood's President, McColley, whereby he was taken off Wood's payroll and petitioner paid his loss of earnings and expenses during his attendance as a witness (45a).

Pezdirtz began testifying on the morning of January 12, 1966 and had not yet stated his expert opinion when

[2] For convenience referred to hereafter as "respondent".

the Committee recessed at the end of the day (46a). While Pezdirtz was testifying that day, and unknown to him and petitioner, Theodore Newhouse, purchasing agent for respondent, telephoned Wood's office in Plainfield, New Jersey. After being told by Romano, a Wood employee, that McColley had given Pezdirtz leave of absence to testify, Newhouse became "upset" and "angry" (115a) and declared that the Newhouse chain was finished with Wood (62a). Romano suggested that Newhouse speak to McColley, who was out of town but would be telephoning Wood's office the next day (63a; 115a).

When the Committee recessed on January 12, Pezdirtz received a message to call Romano (62a). When he did so, Romano described his conversation with Newhouse and instructed Pezdirtz to call McColley at Cleveland the next morning. On hanging up, Pezdirtz told petitioner's officers and counsel of his talk with Romano (62a). Counsel then telephoned Romano, who confirmed his conversations with both Newhouse and Pezdirtz (63a).

Next day, January 13, Pezdirtz called McColley and immediately thereafter informed petitioner's counsel: "I cannot and will not testify. I am to meet McColley tomorrow morning [January 14] at 9:00 A.M. in Plainfield for further instructions. McColley says my testimony will have far more ramifications than he anticipated, and will injure the Wood Company in the trade" (65a). Shortly after, Pezdirtz told petitioner's trial counsel he would not testify further, that his "boss" had "ordered" him not to, since if he did it would "hurt the company" (65a).

When the Committee sessions resumed that morning, Pezdirtz, at the insistence of petitioner's counsel, took the stand but refused to testify and, when asked by petitioner's counsel, refused to state his reasons, saying they were "personal" (46a-47a). Sustaining respondent's objections, the Committee Chairman refused to direct Pezdirtz to state these reasons or to testify further; refused to accept peti-

tioner's offer of proof that the witness' silence was caused by respondent's interference and intimidation; and refused to investigate whether any outside influence was frustrating the Committee's function. The Chairman ruled all these matters "irrelevant" (47a-50a).

Petitioner immediately made, and respondent opposed, an application to District Judge Wortendyke to instruct the Committee to accept petitioner's offer of proof of witness tampering and to advise the Committee of its power to issue subpoenas to persons having knowledge of the facts. Judge Wortendyke said that if he had the authority he would investigate the matter at once, but held that he had no jurisdiction to act while the arbitration was in progress. However, he clearly indicated that in proceedings to vacate the award, petitioner could have a hearing of the witness tampering issue, including an examination of Pezdirtz under oath (50a-52a).

The parties then returned to the Committee. Over respondent's objections, a majority of the Committee issued subpoenas to Pezdirtz, McColley, Romano and Newhouse at petitioner's request for inquiry "as to why this witness is not talking." Pezdirtz was served, but the others avoided service (52a-53a; 61a; 81a-82a).

Next day, January 14, Pezdirtz appearing under subpoena, again refused to testify or to give reasons for his refusal. The Chairman again refused to direct him to answer or to accept petitioner's offer of proof, ruling the inquiry "irrelevant." Like Judge Wortendyke, he suggested that such an inquiry would be appropriate in the District Court on a motion to vacate the award (53a-56a). The Committee then took a five-day recess to permit Pezdirtz to consult his personal counsel, retained for him earlier that morning (58a-59a).

During the recess and at petitioner's request, two stereotypers examined the M.A.N. in an effort, later rendered abortive when the Chairman ruled them incompetent as

experts, to supply the loss of Pezdirtz' expert testimony (59a; 70a-72a).

When hearings resumed on January 19, Pezdirtz announced his willingness to testify and the Chairman directed petitioner's counsel to proceed with his direct examination of the witness (59a). Counsel declined to do so, because the Committee's refusal to inquire, or to permit inquiry, or to accept an offer of proof as to the matter of witness tampering had rendered Pezdirtz so unreliable and incredible that petitioner could no longer present him as its witness and continue to vouch for his credibility. Petitioner explicitly reserved its right to attack as improper any award which might later be rendered (60a-61a). Thereupon Pezdirtz was dismissed by the Committee (60a-61a), petitioner's counsel refusing to do so, again in order to avoid any possible waiver of petitioner's rights.

The hearings continued through February 18. The Committee's award adverse to petitioner (petitioner's designees dissenting) was filed June 30, 1966 and it relied largely on testimony by respondent's experts, who became the only expert witnesses in the case after Pezdirtz had been silenced (38a-39a; 44a).

On the foregoing facts sworn to in affidavits, petitioner moved the District Court for an order pursuant to § 301 of the Labor-Management Relations Act and § 10 of the United States Arbitration Act vacating the award because (a) it had been procured by corruption, fraud and undue means and (b) a majority of the Committee were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy and other misbehavior by which petitioner's rights were prejudiced (40a-41a). Respondent's opposing affidavits having put some of the facts in issue, petitioner moved for a full hearing of its witness tampering claim by the District Court (28A, 20-21c, 26c, 29-30c).

Petitioner's motions were denied and respondent's cross-motion for confirmation of the award and its entry as a judgment of the District Court was granted (28A). That judgment was affirmed by the Court of Appeals (14A).

Reasons for Granting the Writ

The refusal of the Committee and the lower courts to grant a hearing on the question of witness tampering has resulted in a denial of procedural due process, a deprivation of petitioner's rights and remedies under the Labor-Management Relations Act and the United States Arbitration Act, and a departure from the accepted and usual course of judicial proceedings. Taken together, these constitute a special and important reason to grant the writ.

1.

This case presents an important question of federal law which has not been, but should be, settled by the Court. While there have been strong suggestions that "the salutary safeguards of due process of law" must be met in labor arbitrations (Justice Black, dissenting in *Carey* v. *Westinghouse Electric Corp.*,[3] 375 U.S. 261, 273-274 (1964)), and confident prophecy that "the requirements of basic due process will without doubt be held applicable [by the courts] to the arbitration procedure" (Hays, *Labor Arbitration, A Dissenting View*, 105 *et seq.* (1966)), our research has disclosed no reported case squarely holding that the requirements of procedural due process must be satisfied in the

[3] As Justice Douglas noted in his majority opinion in *Carey* (375 U.S. at 270-271), the National Labor Relations Board "shows deference to the arbitral award, *provided the procedure was a fair one and the results were not repugnant to the Act.*" (Emphasis added.) See Note, *The NLRB and Deference to Arbitration*, 77 Yale L. J. 1191 (1968).

arbitration of labor disputes under the Labor-Management Relations Act and the United States Arbitration Act.

The District Court, "assuming any such constitutional right existed", but not deciding that it does, held that the Committee's rejection of evidence of witness tampering did not deprive petitioner of due process or of "a fair hearing" (27A). Although the due process question was fully briefed, the Court of Appeals did not decide the case explicitly in terms of due process, but held that petitioner had not been deprived of "a fair hearing" (12A-13A).

As a result petitioner has been completely foreclosed from having its day in court on the issue of witness tampering, and hence has not been accorded even the minimum requirements of procedural due process. "It is a rule as old as the law . . . that no one shall be personally bound until he has had his day in court . . ." *Galpin* v. *Page,* 85 U.S. (18 Wall.) 350, 368 (1874).

In proceedings of a quasi-judicial as well as judicial character due process demands that parties "be protected by the rudimentary requirements of fair play," i.e., be afforded "a fair and open hearing" which "embraces . . . the right to present evidence" and "those fundamental requirements of fairness which are of the essence of due process in a proceeding of judicial nature." *Morgan* v. *United States,* 304 U.S. 1, 15, 18-19 (1938).

Since arbitrators "act in a quasi-judicial capacity, in place of a court," *Kentucky River Mills* v. *Jackson,* 206 F.2d 111, 117 (6th Cir.), *cert. denied,* 346 U.S. 887 (1953), it follows that principles of due process are also applicable to arbitration proceedings.

It is of special importance that requirements of due process be met in arbitrations under the Labor-Management Relations Act, because the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike, *Textile Workers Union* v. *Lincoln Mills,* 353 U.S.

448, 455 (1957), and "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government," *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). And as the labor arbitrator is a vitally important part of the "system of industrial self-government" created by the bargaining agreement, whose decisions are final and only rarely reviewable by the courts, *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 568 (1960), his power is necessarily subject to the restrictions and limitations of public policy, *The Torrington Co.* v. *Metal Products Workers Union Local 1645*, 362 F.2d 677 (2d Cir. 1966), of which due process is essentially a part.

If the decisions below are permitted to stand, they will have an injurious precedential effect on future labor-management arbitrations,[4] the standards governing their conduct and that of arbitrators, and the proper exercise of judicial power to vacate arbitration awards. They seriously impair the viability of arbitration and undermine the integrity of the arbitration forum.

Under the aegis of the lower courts, witnesses may be intimidated, spoliated and suppressed, and arbitration proceedings disrupted and sabotaged, resulting in brazen obstruction of the administration of justice. Nevertheless, the arbitrator may refuse to investigate this interference with his function on the ground that the inquiry would be "irrelevant" to the substantive question before him, even though the evidence suppressed is directly probative of that question. With his arbitral inaction, how-

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[4] It is estimated that at least 20,000 cases are arbitrated every year, Herzog and Stone, *Voluntary Labour Arbitration in the United States*, 82 Int'l Lab. Rev. 301 (1960). Approximately 94 percent of all bargaining agreements, of which there are estimated to be about 150,000, provide for arbitration of some or all contract disputes. U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-1, Major Collective Bargaining Agreements 1 (1964).

ever arbitrary, a court may not interfere, at least not while the arbitration proceedings are in progress and the arbitrator has exclusive jurisdiction. Even after an award has been rendered, a court may not set it aside, since the arbitrator's refusal to hear evidence of witness tampering is merely an evidentiary ruling which may not be judicially reviewed, unless it can be proved that the arbitrator's refusal was corrupt, fraudulent, or procured by undue means. Thus the powers of arbitrators have been grossly enlarged and those of the courts to review arbitration proceedings and awards have been emasculated. These results surely are not within the contemplation of parties to bargaining agreements providing for arbitration, nor were they intended by Congress in enacting the Labor-Management Relations Act and the United States Arbitration Act.

If, as here, one party to a labor arbitration may be victimized with impunity by the corrupt practices of his adversary, arbitration will surely fall into disfavor and atrophy from disuse.

2.

Whether petitioner was accorded procedural due process—whether the arbitration was inherently fair—is inextricably involved in the lower courts' consideration of the statutory question whether "the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy" or "of any other misbehavior by which the rights of [petitioner] have been prejudiced" within § 10 of the United States Arbitration Act. For these provisions are really the statutory requirements of due process in arbitration proceedings.

The Court of Appeals erroneously minimizes the Committee's refusal to inquire into the silencing of Pezdirtz as "an erroneous ruling by arbitrators, which does not

affect the fairness of the proceeding as a whole" (13A). This conclusion derives from the false premises that the matter of witness tampering "was peripheral to the issue of fact which was before the arbitrators for decision"; and that even if the inquiry sought by petitioner had resulted in "vindication of the integrity of the proceedings," it "would not affect the question whether the union [petitioner] had a fair hearing on the factual issue whether the M.A.N. machine could be safely and effectively run with one operator" (13A).

But the silencing of Pezdirtz was certainly not "peripheral" to the hearing. Directly to the contrary, it was an assault on the integrity of the hearing, disrupting the proceedings and obstructing the administration of justice in the very forum established by contract of the parties as specifically enforced by the judgment of the District Court.

Nor was the silencing of Pezdirtz "peripheral" to the manning issue before the Committee. That issue depended for solution on expert testimony and Pezdirtz was petitioner's only expert witness. His silencing deprived petitioner and the Committee of vitally important evidence directly bearing on the manning issue in arbitration. The Committee's refusal to take any self-protective action whatever, its rejection of evidence that respondent and others had influenced the witness, and its obstructive prevention of petitioner's attempted inquiry into the matter "shock the sense of fair play—which is the essence of due process." *Galvan* v. *Press,* 347 U.S. 522, 530 (1953).

Persisting in its myopic view of the question as one of evidence rather than of due process, the Court of Appeals held that, *even assuming there was witness tampering,* the Committee's refusal to investigate it did not prejudice petitioner's rights, because:

> "While the suppression of evidence, if it occurred, may have had evidential value it cannot be said as a

> matter of law that it was decisive or that its exclusion was seriously harmful in the light of the other evidence in the case" (12A).

We read this to mean that a party may silence an opposing witness, provided he has a strong enough case on the merits—an outrageous proposition on its face.

This holding contradicts explicit decisions of this and other courts to the contrary. See, e.g., *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1943). In that patent infringement suit, plaintiff submitted to the Third Circuit Court of Appeals an article representing the patented device as an advance in the art, purportedly written by a disinterested person but actually prepared by plaintiff, and obtained a decision that the patent was valid and infringed. After discovering the facts, defendant petitioned the Court of Appeals to set aside the judgment previously entered pursuant to its mandate. Relief was denied on the ground that, in view of the other evidence supporting the patent, it was impossible to say that had the court known the article was spurious, its original decision would have been different (137 F.2d 764, 768-69). Unanimously reversing, this Court said through Mr. Justice Black:

> "Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances call for such an attempted appraisal. Hartford's officials and lawyers thought the article material. They conceived it in an effort to persuade a hostile Patent Office to grant their patent application, and went to considerable trouble and expense to get it published. Having lost their infringement suit based on the patent in the District Court wherein they did not specifically emphasize the article, they urged the article upon the Circuit Court and prevailed. They are in no position now to dispute its effectiveness" (322 U.S. at 247).

See also *Barr Rubber Products Company* v. *Sun Rubber Company*, 277 F. Supp. 484, 500, n. 18 (S.D.N.Y. 1967);

Singer Sewing Machine Co. v. *American Safety Table Co.*, 88 F. Supp. 260 (E.D. Pa. 1949).

This same principle was applied to arbitration in *Insurance Company of North America of Philadelphia* v. *Hegewald*, 161 Ind. 631, 647, 66 N.E. 902, 908 (1903), the Supreme Court of Indiana stating:

> "A rule which seems to be reasonable, and one well settled by authorities, is that a party to an arbitration, who by his own acts, either attempts to corrupt or improperly influence one or more of the arbitrators to make an award in his favor, can not be heard to say that such act or acts on his part were ineffectual to accomplish the purpose designed. If the conduct of such party had a tendency to affect improperly the decision of the arbitrator or arbitrators in the matter in issue, it will be held to be sufficient to invalidate the award, without inquiring as to whether the conduct or act in question actually produced any harmful results to the complaining party."

So here, *on the assumption of the Court of Appeals that respondent was guilty of witness tampering*, neither respondent nor the courts are in a position to assert that, even if proved, it would not have changed the outcome or that, had Pezdirtz been permitted to testify without interference, his testimony would not have outweighed respondent's evidence and resulted in an award favorable to petitioner.

The Court of Appeals, again *assuming witness tampering*, holds further that since petitioner's counsel refused to continue direct examination of Pezdirtz on the merits when he changed his mind and announced his readiness to resume his testimony, petitioner may not complain that respondent deprived it of the witness:

> "It [petitioner] could not by its own conduct make the effort it attributed to the [respondent] successful and then protest at the success" (12A).

This holding misses the point that petitioner declined to proceed blindly with the witness because the Committee was preventing inquiry into the reasons for his original refusal to testify and his later consent to do so. It was this right to a fair hearing—to arbitral and procedural due process—which petitioner feared it might waive if it proceeded with the witness as the Committee Chairman directed it to do. However, both lower courts have held that the very action which petitioner took to avoid a waiver of its right to vacate the award because of the denial of due process constituted a forfeiture of that right.

In any event, this finding that petitioner caused respondent's "effort" to spoil the witness to be "successful" ignores all the efforts made by petitioner to inquire into respondent's conduct and its effect on the witness. Even more unrealistically, it disregards the fact that respondent had thoroughly spoiled Pezdirtz as a witness from the moment it first induced him to refuse to testify. His reliability was destroyed by his repeated refusals to testify or to state the reasons for his refusal. His belated and reluctant offer to resume his testimony, after a lapse of five days, could not repair this damage to his credibility, particularly since any chance of rehabilitating him was foreclosed by the Committee's refusal to permit petitioner's counsel to obtain from the witness an explanation of his chameleonic conduct. Even if, upon resuming, the witness had continued to give testimony favorable to petitioner, it would merit little credence in view of his erratic behavior. If, on the other hand, his testimony was unfavorable to petitioner, while petitioner might have sought to impeach him, this would have been an idle exercise, for witness impeachment is not substantive proof and false testimony proves nothing. *New York Life Insurance Co.* v. *Bacalis,* 94 F.2d 200, 202 (5th Cir. 1938); 3 Wigmore on Evidence § 1018 (3d ed., 1940).

When the Committee directed petitioner's counsel to proceed with the witness, it placed petitioner in a highly

prejudicial dilemma. If petitioner proceeded with the witness, it would waive its right to a hearing as to respondent's interference with the witness on a motion to vacate the award. If petitioner refused to proceed, it would, as both lower courts have since held, waive the right to claim it had been deprived of the witness. Thus, far from being fair, the conduct of the hearing at this stage entrapped petitioner into a position where, no matter what it did, it was bound to forfeit its rights.

But even assuming it was an error of judgment for petitioner's counsel to refuse to proceed with the witness under these circumstances, this misstep should not deter this Court from intervening to devitalize the judgment below in order to preserve the integrity of the arbitral process. As this Court said in *Hazel-Atlas Glass, supra,* at 246:

> "The Circuit Court . . . thought Hazel had not exercised proper diligence in uncovering the fraud and that this should stand in the way of its obtaining relief. . . . But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. [Citations omitted] Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

So here, this case does not concern the parties alone. Tampering with the administration of justice in a labor arbitration ordered by a federal court under federal

statutes involves far more than injury to a single litigant. It is an erosion of the grievance machinery which pulsates at the very heart of the system of industrial self-government, whose protection should not be held to depend on the astuteness and agility of counsel in sidestepping a series of pitfalls created by an arbitrator's unorthodox rulings and induced by the contrivances of the other side.

3.

The District Court's denial of a hearing into the charge of witness suppression deprived petitioner of constitutional due process and of the remedies provided by the Labor-Management Relations Act and § 10 of the United States Arbitration Act.

"Whenever necessary to the protection of the parties [due process] must give them an opportunity to be heard respecting the justice of the judgment sought." Lester S. Jayson and Norman J. Small, eds., *The Constitution of the United States of America—Analysis and Interpretation,* 1185 (1964). The petitioner was denied this constitutional right by the District Court.

The District Court also denied petitioner the remedy expressly provided by § 10(a) of the United States Arbitration Act which empowers a court to vacate an award

> "(a) Where the award was procured by corruption, fraud or undue means."

On motion to vacate the award on these grounds, petitioner was entitled to a full and fair hearing, including the right to produce evidence that the award had been procured, through witness suppression and spoliation, "by corruption, fraud or undue means."

The Court of Appeals tries to vindicate the denial of such a hearing by a construction of the words "corrup-

tion, fraud or undue means'' in § 10(a) which is peculiar to say the least. A distinction is said to exist between a ''perjured'' and a ''stifled'' witness. The court assumes that an award obtained by ''perjured testimony'' would be one procured by ''fraud'' under § 10(a), but notes that the award here is attacked not because Pezdirtz gave ''perjured testimony,'' but because he had been ''stifled.'' The refusals of the Committee and the District Court to take proof that the witness had been ''stifled'' by respondent are upheld because, says the Court of Appeals:

> ''The award followed after a conscious [*sic*] judgment by the arbitrators that the panel should not undertake an investigation of the union charge and there is no claim that the panel's conduct was corrupt or fraudulent or influenced by undue means'' (11A).

This contrived distinction between ''perjured'' and ''stifled'' testimony is manifestly invalid. Surely to stifle a witness is corrupt, just as it is corrupt to suborn him. An award procured by witness intimidation is fraudulent just as is one obtained by perjury. A cause may be defeated by the deprivation of indispensable testimony as by the concoction of perjured testimony. Proof of either type of ''corruption, fraud or undue means'' warrants vacating an award. Opportunity to present such proof must be given, if not by the arbitrator, then surely by the court preliminarily to either confirming or vacating an award. The demands of due process and fundamental fairness require no less.

Indeed, at one stage of the proceeding the District Court itself recognized this. When petitioner applied for relief on January 13, 1966, the day Pezdirtz first refused to testify, Judge Wortendyke stated the interests of justice required that every attempt be made ''to smoke out any possible fraud which might threaten to taint the proceedings'' whether in ''court or before an arbitrator''

(51a, 52a). As he stated this in connection with Pezdirtz' refusal to testify, at that time he clearly regarded witness stifling as "fraud" within § 10(a) of the United States Arbitration Act.

In view of this, the following holding of the District Court is simply incomprehensible:

> "The merits of the controversy submitted to the arbitrators were not dependent upon the attitude of Newhouse toward the employer of Pezdirtz nor can the award be said to have been procured by corruption, fraud or undue means because Newhouse, learning of Pezdirtz's testimony, had allegedly threatened to deprive the Wood Company of his business, and thereby allegedly prevented Pezdirtz from continuing to serve as an expert witness by the order, or at the request, of his employer." (26A)

The District Court's summary denial of a hearing to establish this stifling and fraud is hard to comprehend in view of the court's assurances on January 13 that a hearing would be provided on a motion to vacate the award:

> "It occurs to me, however, that upon proceedings taken under the Arbitration Act to forestall the entry of judgment on the award, I would think that an application to the Court might be made for the taking of the witness' [Pezdirtz'] deposition at his place of residence or other convenient location, and I would think that that would serve since he would be under oath and be equally liable to be charged with perjury if he did not tell the truth. I believe that that should serve your needs, but I cannot at the present time grant you the relief that you ask" (60b).

Such a hearing in a case of witness suppression and spoliation is indispensable. For the

> "duty of the Law and the Courts is flagrantly neglected when the *intimidation of witnesses* is allowed to be practised unchecked." 8 Wigmore on Evidence § 2192 (3d ed., 1940).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York
September 4, 1968

Respectfully submitted,

WILLIAM R. MEAGHER
THOMAS L. MORRISSEY
Attorneys for Petitioner

Constitutional and Statutory Provisions Involved

Constitution of the United States of America, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Labor-Management Relations Act § 301, 61 Stat. 156, 29 U.S.C. § 185

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of

the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

United States Arbitration Act § 10, 61 Stat. 669, 9 U.S.C. § 10

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Opinion of the United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 16571

NEWARK STEREOTYPERS' UNION No. 18,
Appellant,
against
NEWARK MORNING LEDGER CO., and NEWARK NEWSPAPER PUBLISHERS' ASSOCIATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued February 9, 1968

Before HASTIE, *Chief Judge*, FREEDMAN and VAN DUSEN, *Circuit Judges*.

(Filed June 18, 1968)

FREEDMAN, *Circuit Judge*.

The plaintiff union appeals from the district court's confirmation of an arbitration award.

The arbitration decided a dispute concerning the number of men required for the safe and efficient operation of a new M.A.N.[1] stereotype plate-casting machine which de-

[1] The initials by which the machine is known are derived from the name of its German manufacturer, Machinen-Fabriken, Augsburg, Nürnberg.

fendant, Newark Morning Ledger Company, the publisher of the Newark Star-Ledger newspaper, was installing in its plant. The union represents the operators of the machine under a collective bargaining agreement with the Newark Newspaper Publishers Association, also named as a defendant, as the agent of the Newark Morning Ledger Company.

Discussions between representatives of the union and the Ledger Company regarding the dispute failed to achieve agreement. The company insisted that the machine could be operated safely and efficiently by one man, while the union argued that at least two were necessary. Pursuant to the collective bargaining agreement each party appointed two representatives, and when these four were unable to resolve the dispute by a majority decision there came into operation a provision of the agreement for a binding arbitration after they had selected a neutral fifth member, who was to serve as chairman. They were unable, however, to agree on the selection of the fifth member and the union filed a complaint in the district court to compel arbitration. Jurisdiction was based on § 301 of the Labor Management Relations Act (29 U.S.C. § 185), and the complaint sought relief under § 5 of the United States Arbitration Act (9 U.S.C. § 5), which provides the federal law applicable to the dispute.[2] The district court ordered

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[2] See Textile Workers of America v. Lincoln Mills, 353 U.S. 448 (1957).

As to the applicability of the United States Arbitration Act to cases brought under § 301 see Pietro Scalzitti Co. v. International Union of Operating Engineers Local 150, 351 F.2d 576, 579 (7 Cir. 1965); Signal Stat. Corp. v. Local 475, United Electrical, Radio & Machine Workers, 235 F.2d 298 (2 Cir. 1956), cert. denied, 354 U.S. 911 (1957); Tenney Engineering, Inc. v. United Electrical, Radio & Machine Operators of America, 207 F.2d 450 (3 Cir. 1953).

arbitration and named the neutral member of the arbitration panel.[3]

The arbitration panel heard testimony for six weeks and ultimately rendered an award upholding the company's right to employ a single operator on the machine. The two members designated by the union dissented. The majority found, on ample evidence to support its conclusion, that the latest model of the M.A.N. machine was a "fully automated one-man mechanical contrivance tried and proved by operative experience", which "had unquestioned success throughout the United States." The award was attacked by the union in a motion to vacate under § 10 of the United States Arbitration Act (9 U.S.C. § 10) and the company moved to confirm. After consideration of affidavits and oral argument by both parties the district court confirmed the award. 261 F.Supp. 832 (D.N.J. 1967).

The union challenges the award on the ground that the arbitration panel refused to consider its claim that the company had intimidated and silenced its expert witness, Pezdirtz, whom it had called to testify regarding the construction of the M.A.N. machine and the number of men required for its safe and efficient operation. Pezdirtz had formerly been employed by the exclusive American distributor for the German manufacturer of the M.A.N. machine and therefore was familiar with it. Immediately prior to his appearance before the arbitration panel he had been employed by Wood Newspaper Machinery Corp., the manu-

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[3] An earlier order by the district court requiring arbitration and ordering that two men operate the machine during the pendency of the arbitration proceedings was vacated on appeal because the district court had made no findings of fact as required by Rules 52(a) and 65(d) of the Federal Rules of Civil Procedure. Newark Stereotypers Union No. 18 v. Newark Morning Ledger Co., 353 F.2d 511 (3 Cir. 1965). On remand the district court again ordered arbitration, with the fifth member it had previously designated, but denied interim relief.

facturer of a competing machine. The union had arranged with Wood that Pezdirtz should be taken off Wood's payroll for what was termed a leave of absence while he testified before the arbitration panel. The union paid his traveling expenses, maintenance and the earnings he would have received from Wood during the period of his service as a witness.[4] Pezdirtz appeared as a witness on Januaray 12, 1966. He testified at length that day regarding the M.A.N. machine until at the suggestion of the chairman the panel recessed to permit Pezdirtz to inspect the machine at the Star-Ledger plant. When the sessions resumed next morning Pezdirtz refused to testify further and when pressed for the reason said that it was a personal one.

At this point the union's counsel suggested to the arbitration panel that Pezdirtz's refusal to testify was the result of improper conduct by officials of the Ledger Company and asked that the panel investigate whether a contempt had been committed against it and whether any outside influence was frustrating its function. The panel denied both requests and declared that if the union insisted on the testimony of Pezdirtz and he still refused to give it the appropriate procedure would be to apply to the district judge for an order directing him to resume his testimony. The panel recessed to enable the union to apply to the district judge for relief. The district judge, after an informal hearing in chambers announced that he was without jurisdiction to act during the pendency of the arbitration. The parties thereupon returned to the arbitration panel which at the union's request issued subpoenas to Pezdirtz, two executives of Wood and the principal stockholder of the Ledger Company. Only the subpoena directed to Pezdirtz was served.

Next day Pezdirtz appeared pursuant to the subpoena and again refused to testify or to give any reason for his refusal. The arbitration panel again declined to inquire

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[4] He had been paid $1,786.20 before his testimony abruptly ended.

into the reasons for Pezdirtz's refusal or to accept offers of proof with regard to it, ruling the entire matter irrelevant to the issues presented for arbitration. Upon the requests of Pezdirtz and the union the panel recessed for four days to allow Pezdirtz to consult with his personal counsel and to afford the union an opportunity to have two other expert witnesses examine the machine at the Star-Ledger plant.

Upon resumption of the proceedings on January 19, Pezdirtz appeared with his personal counsel who stated that Pezdirtz was now willing to testify. The union's counsel, however, refused to proceed with Pezdirtz unless he was first permitted to inquire into the reasons for Pezdirtz's original change of mind, and to enter into an investigation of it. He also claimed the Pezdirtz had not yet examined the machine as the panel had directed and therefore would be incompetent to testify regarding it. He therefore refused to put any questions to Pezdirtz on the ground that he was "a spoiled witness, and the quicker he is disposed of the better." When the panel asked if counsel would object if the committee discharged the witness he replied that he neither objected nor consented, but stood mute. The panel thereupon excused Pezdirtz. The hearings continued through February 18, and the panel heard many other witnesses, including the two additional expert witnesses for the union who had examined the M.A.N. machine at the Star-Ledger plant.

After the panel made its award on June 30, the union filed a motion to vacate and reiterated its demand for an investigation of its charges that officials of the Ledger Company had conspired with Wood to stifle Pezdirtz's testimony. It submitted affidavits setting out the substance of these claims which were challenged by affidavits filed on behalf of the company. The opposing affidavits are in agreement that the purchasing agent and principal stockholder of the newspaper chain of which the Star-Ledger is a member had telephoned Wood and that Wood in turn had

called Pezdirtz. The union's affidavits claimed that the Ledger Company's officials threatened to cease doing business with Wood if Pezdirtz went on with his testimony. The Company's affidavits denied that it made any threats of reprisal and claimed that the purpose in calling Wood was to inquire into Pezdirtz's current employment status in light of his disingenuous testimony that he was currently unemployed, and upon clarification to use the information in cross-examining him. The district court held that the union's allegations were insufficient to justify vacation of the award, that the union had not been deprived of a fair hearing before the arbitration panel, and that it could not complain of the loss of Pezdirtz's testimony because it had itself rejected his subsequent offer to complete his testimony.

The United States Arbitration Act, which is based on the pioneering New York Arbitration Act,[5] and is substantially similar to the Uniform Arbitration Act,[6] has significantly altered the general common law principle that arbitrators are the sole judges of the case on the facts and the law,[7] by authorizing the vacation of an award on specified grounds. Section 10 empowers the federal courts to vacate an arbitration award:

> "(a) Where the award was procured by corruption, fraud, or undue means.
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> ...

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[5] N.Y. Laws, 1920, c. 275.

[6] The first Uniform Arbitration Act drafted in 1925, was adopted in Nevada, North Carolina, Pennsylvania, Utah, Wisconsin and Wyoming. A second version whose review provision is substantially identical with the 1925 Act was promulgated in 1955 and has been adopted in Arizona, Illinois, Maryland, Minnesota, Massachusetts and Wyoming.

[7] See LaVale Plaza v. Noonan, 378 F.2d 569, 572-73 (3 Cir. 1967).

> "(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." (9 U.S.C. § 10)

The statute was not intended to overthrow the general advantage of speedy and effective decision of disputes by arbitration and the creation of these general grounds does not obliterate the hesitation with which courts should view efforts to re-examine awards. See Karppinen v. Karl Kiefer Machine Co., 187 F.2d 32, 34-35 (2 Cir. 1951), A. N. Hand, J. To do otherwise would defeat the primary advantages of speed and finality which led to the development of arbitration in business disputes and which is made even more compelling by its expanding use in labor disputes where arbitration is a favorite of the so-called federal common law developed under § 301.[8]

We need not here define the limits of "corruption, fraud, or undue means" under § 10(a) or "misconduct" prejudicial to the rights of any party under § 10(c). We may assume that the obtaining of an award by perjured testimony would constitute fraud under § 10(a). See Karppinen v. Karl Kiefer Machine Co., supra, at 34. Here, however, there is no claim that perjured testimony was presented. The attack on the award runs the other way. It is based not on the falsehood of any testimony presented, but instead on the claim that the union was deprived of testimony which otherwise would have been available to it. The arbitration panel was fully aware of the claim that the company had stifled Pezdirtz's earlier readiness to testify

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[8] See United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

for the union, for it was in its presence that Pezdirtz's original refusal to testify and his later willingness to go on occurred. The award followed after a conscious judgment by the arbitrators that the panel should not undertake an investigation of the union charge and there is no claim that the panel's conduct was corrupt or fraudulent or influenced by undue means.

We are thus led to the provision of § 10(c) dealing with "misconduct [by the arbitrators] . . . in refusing to hear evidence pertinent and material to the controversy", which results in prejudice to a party's rights.

Literally construed § 10(c) would make all rulings by arbitrators excluding evidence reviewable by the courts, and "misconduct" has already been construed authoritatively to mean not bad faith, but "misbehavior though without taint of corruption or fraud, [if] . . . borne of indiscretion." Stefano Berizzi Co. v. Krauz, 239 N.Y. 315, 317, 146 N.E. 436, 437 (1925), Cardozo, J. The statute cannot be read, however, to intend that every failure to receive relevant evidence constitutes misconduct which will require the vacation of an arbitrator's award.

It is true that an attempt by a litigant to persuade a witness not to testify is properly admissible against him as an indication of his own belief that his claim is weak or unfounded or false.[9] But it has been held that even the erroneous exclusion of such evidence by a court would not be reversible error on appeal if it was not of substantial harm to the party.[10] In an arbitration case a court cannot act as a legal screen to comb the record for technical errors in the receipt or rejection of evidence by arbitrators, who in most cases are laymen. A fair accommodation between the words of the statute and the characteristic nature of

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[9] See Great American Insurance Co. v. Horab, 309 F.2d 262 (8 Cir. 1962), citing many cases; 2 Wigmore, Evidence § 278 (3d ed. 1940).

[10] Great American Insurance Co. v. Horab, supra, n. 8.

arbitration would require that such an error must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing. Even if full play is given to the inference that a party's effort to suppress the testimony of a witness indicates a weakness or lack of merit in his position, it must be recognized that the arbitrators here considered all of the other evidence which was presented to them by both sides on the merits of the issue whether the machine required more than one operator. While the suppression of evidence, if it occurred, may have had evidential value it cannot be said as a matter of law that it was decisive or that its exclusion was seriously harmful in the light of the other evidence in the case.

After Pezdirtz was excused the union presented the testimony of two other expert stereotypers and was afforded ample opportunity to cross-examine the experts whom the company presented on its own behalf. It had the four week period after the Pezdirtz incident, during which the hearings continued, to procure other evidence if it deemed it necessary to do so. More fundamental even than this is the fact that the union itself refused to examine Pezdirtz when he announced his readiness to go forward as a witness after consulting with his independent counsel. Having taken this position at the time the union may not now assert as a fact that Pezdirtz would not have testified in its favor. It cannot have the advantage of an assumption which runs contrary to the witness's offer when it was itself unwilling to accept or even test it. It could not by its own conduct make the effort it attributed to the company successful and then protest at the success. Nor in view of the position which the union took before the arbitration panel at that time is it appropriate for us to speculate now on what the union might have done if in continuing the examination of Pezdirtz it had been surprised by adverse instead of favorable testimony, and the panel had persisted in its refusal to hear the union's allegations. It is enough

that the union which had called him and had been balked temporarily in its effort to obtain his testimony subsequently was afforded the opportunity to have it but refused to accept it.

In these circumstances the case calls for the application of the principle that an award will not be vacated because of an erroneous ruling by arbitrators, which does not affect the fairness of the proceeding as a whole. As the court said in Karppinen v. Karl Kiefer Machine Co., supra at 35, even if perjury is proven and constitutes fraud under § 10(a) of the Act, it will not justify the vacation of an award if it concerns an issue remote from the question to be decided.

Here the union's contention that the arbitration panel should have held an inquiry or investigation for the general purpose of exposing the misconduct of the company was peripheral to the issue of fact which was before the arbitrators for decision. The panel had no general investigatory function, and the union did not claim the benefit of the inference that the company's position on the issue before the panel was weak or unfounded because of an effort to suppress Pezdirtz's testimony. Whatever might have come from the vindication of the integrity of the proceedings would not affect the question whether the union had a fair hearing on the factual issue whether the M.A.N. machine could be safely and efficiently run with one operator. Even if it touched upon the problem to some extent it is not so substantial or pervasive that the award arrived at by the arbitrators after lengthy hearings and the presentation of substantial evidence by both sides long after the Pezdirtz incident had ended must be cast aside as a quasi-judicial product which is tainted either by fraud or misconduct.

The judgment of the district court will be affirmed.

Judgment of the United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 16,571

NEWARK STEREOTYPERS' UNION No. 18,
Appellant

vs.

NEWARK MORNING LEDGER CO., and NEWARK NEWSPAPER PUBLISHERS' ASSOCIATION

(D.C. Civil No. 1186-65)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

HASTIE, *Chief Judge*, and
FREEDMAN and VAN DUSEN, *Circuit Judges*.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed February 6, 1967 and entered February 8, 1967, be, and the same is hereby affirmed, with costs.

Attest:

THOMAS F. QUINN
Clerk

June 18, 1968

Opinion of District Court

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action

File No. 1186-65

WORTENDYKE, District Judge:

This is an action upon cross-motions; the defendants moving for an Order confirming the arbitration award, the plaintiff moving for an Order vacating the award.

Plaintiff Labor Union (hereinafter Union), predicating jurisdiction on Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, filed its Complaint in this Court seeking a judgment against defendant-employer (hereinafter Ledger) to compel arbitration of the question of the number of employees who should be assigned to the operation of a stereotype plate-casting (M.A.N.) machine which was being installed by the Ledger in its newspaper printing plant in Newark, New Jersey. A Collective Bargaining Agreement (hereinafter Agreement) between the Union and defendant Newark Newspaper Publishers Association, acting on behalf of the Ledger, was in effect at all pertinent times hereinafter referred to. The Agreement governed conditions of employment of members of the Union by the Ledger. Section 26 of the Agreement provides as follows:

> "*Section 26*
>
> A Joint Standing Committee, should necessity arise, shall be formed, two to be appointed by the Publishers and two by the Union and the four so appointed, if unable to agree, shall select a fifth member who shall act as chairman. This Committee shall

interpret any of the terms or conditions of this contract, should controversy arise concerning them, and shall have complete jurisdiction to ajudicate finally any and all disputes, including discharge cases, which are alleged to involve the interests of either party as defined in this contract. Under all circumstances work in the stereotyping room of the Publishers shall be continued without interference or interruption in a regular and orderly manner until all differences under the contract are settled by conciliation or arbitration. All majority decisions of the Standing Committee shall be final and binding upon both parties."

The Complaint alleged that in June, 1965, a question arose between the Union and the defendants regarding the number of men to be assigned to the M.A.N. machine. Each party to the Agreement appointed its representatives in accordance with Section 26, but the appointees of the parties were unable to resolve their disagreement respecting the manning of the machine, and they were also unable to agree upon an impartial chairman for the Joint Standing Committee (hereinafter Committee). Because of the inability of the parties to agree upon an arbitrator to act as Chairman of the Committee, and the absence of any provision in the Agreement dispositive of the consequent impasse, this Court was requested by the parties to designate and appoint such an arbitrator in order to effectuate the arbitration clause in the Agreement. The cause having come duly to issue upon the Amended Complaint and Answer thereto, Summary Judgment for the Union was entered by this Court's Order of December 23, 1965. That Order provided: (1) that the dispute as to the number of journeymen stereotypers who should be assigned to the operation of the M.A.N. machine was arbitrable under the Agreement; (2) that the Honorable Harry Heher (a retired Justice of

the New Jersey Supreme Court) be designated as Chairman of the Committee provided for in Section 26 of the Agreement; (3) that the parties proceed to arbitrate their dispute before the Committee; and (4) that the fee and expense of the Chairman of the Committee be borne equally by plaintiff and defendants. The Court retained jurisdiction of the cause to enable either party to apply for such other or further relief as might be necessary and proper.

The parties proceeded with the arbitration as ordered. On June 30, 1966, the Committee filed with the Clerk of this Court, a written "Decision and Determination of Dispute" signed and concurred in by a majority of the Committee upon written Findings of Fact, Conclusions of Law and the evidentiary record of proceedings before it which constituted the arbitration award upon the dispute submitted by the parties. That award is as follows:

> "Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, the Joint Standing Committee makes the following resolution of the Dispute, and the Arbitration Award:
>
> (1) The Star-Ledger Company has determined to use only one journeyman stereotyper in the operation of its M.A.N. Machine; and this determination is pursuant to the Star-Ledger's management prerogative,
>
> (2) The Star-Ledger's Contract with the Union does not bar this determination;
>
> (3) The Star-Ledger's shop practice does not bar this determination;
>
> (4) The industry practice does not bar this determination;
>
> (5) This determination is not in violation of the Collective Bargaining Agreement, but is in full accord with the essence of the provisions;

(6) One-man operation of the given M.A.N. Machine is safe, efficient and not unduly burdensome on the single stereotyper of the Union; and

(7) One-man operation of the M.A.N. Machine is proper and valid and effective in the Newark Star Ledger plant, and in keeping with all reasonable requirements."

The Ledger has moved this Court for an Order confirming the arbitration award. The Union has moved the Court for an Order vacating the award upon the following grounds:

"(1) Because a majority of the Joint Standing Committee refused to accept evidence of alleged witness-tampering by Ledger, thereby depriving Union of due process of law;

(2) Because the Award was a result of corruption;

(3) Because the Joint Standing Committee exceeded its powers as arbitrators by 'redeciding' the question of arbitrability of the dispute submitted."

In support of its motion to confirm the Award, the Ledger contends that the grounds urged for vacation thereof are insufficient in law and without support in the record or the affidavits submitted upon the cross-motions.

This Court's duty in the face of the confronting motion to vacate the award is prescribed by the United States Arbitration Act, 9 U.S.C. § 1 et seq. Section 10 of that Act authorizes the Court to make an order vacating the award upon the application of any party to the arbitration:

"(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

These statutory grounds for vacating an award must be read in the light of the rule that the Court's function in vacating, or confirming, an arbitration award is "severely limited". *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2nd Cir. 1960) cert. denied 363 U.S. 843 (1960). To warrant vacating the award in this case, upon the statutory grounds asserted, the Union must "'• • • clearly demonstrate that the [Committee's] award amounted to a 'manifest disregard'[1] of the law or 'manifest[s] an infidelity' to the [Committee's] obligation to interpret and apply the collective bargaining agreement.'"[2] *Metal Products Workers Union, Local 1645* v. *Torrington Co.*, 242 F. Supp 813, 819 (D.Conn. 1965) aff'd 358 F.2d 103 (2nd Cir. 1966).

It is the general rule that the courts will refuse to review the merits of an arbitration award. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); *United Steelworkers of America*

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[1] See *Wilko* v. *Swan*, 346 U.S. 427, 436 (1953).

[2] *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

v. *American Manufacturing Co.*, 363 U.S. 564, 568 (1960). It is true that the arbitrator is not free to "• • • dispense his own brand of industrial justice", *United Steelworkers of America* v. *Enterprise Wheel & Car Corp., supra* at 597, but his interpretation and application of the collective bargaining agreement, and the arbitration which flows from such collective bargaining agreement, will not be questioned by the courts where the arbitrator has authority to act. *Western Iowa Pork Co.* v. *National Brotherhood Packinghouse & Dairy Workers, Local No. 52*, 366 F.2d 275, 277 (8th Cir. 1966); See *Torrington Co.* v. *Metal Products Workers Union Local 1645*, 363 F.2d 677, 682 (2nd Cir. 1966); *Local 7-644, Oil, Chemical & Atomic Workers International Union, AFL-CIO* v. *Mobil Oil Co.*, 350 F.2d 708, 712 (7th Cir. 1965) reh. denied September 9, 1965, cert. denied 382 U.S. 986 (1966). *The award may not be examined for alleged mistakes of law and erroneous evaluation of evidence. Ficek* v. *Southern Pacific Company*, 338 F.2d 655, 657 (9th Cir. 1964) reh. denied December 22, 1964, cert. denied 380 U.S. 988 (1965), citing *Bower* v. *Eastern Airlines, Inc.*, 214 F.2d 623, 626-627 (3rd Cir. 1954); See *Textile Workers Union of America* v. *American Thread Co.*, 291 F.2d 894, 896 (4th Cir. 1961).

> "The law favors arbitration and it has long been an accepted principle of law, with respect to review by a court of an arbitration award, that there exists strong presumption favoring the validity of the award. *Burchell* v. *March*, 17 How. 344, 58 U.S. 344, 350, 15 L.Ed. 96." *Nickals* v. *Ohio Farmers Insurance Company*, 237 F. Supp. 904, 906 (N.D. Calif. 1965).

If the above quotation were not the state of the law, then there would merely be a substitution of the Court's judgment in place of the judgment of the arbitrators chosen by the parties. This would make an award the *commence-*

ment, not the end, of litigation. See *Burchell* v. *Marsh, supra* at 349. "The present federal policy is to promote industrial stabilization through the collective bargaining agreement." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

ALLEGED WITNESS TAMPERING

Since the proper construction of the collective bargaining agreement was for the Committee to determine, if its construction thereof had ample basis and cannot be held to be capricious, then the Committee's rulings as to the admissibility of evidence, justified by its interpretation of the Agreement, do not constitute a refusal to hear material and pertinent evidence. *Kreindler* v. *Judy Bond, Inc.*, 36 Misc. 2d 948, 234 N.Y.S. 2d 382, 51 LRRM 2263 (1962) aff'd 18 App. Div. 2d 1138, 239 N.Y.S.2d 532, 54 LRRM 2244 (1963) cert. denied 375 U.S. 954 (1963). Further, an arbitration award will not be overturned based upon a misinterpretation of law, *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp., supra* at 808, or insufficiency of supporting facts, *Orion Shipping & Trading Co.* v. *Eastern States Petroleum Corp. of Panama, S.A.*, 312 F.2d 299, 300 (2nd Cir. 1963) cert. denied 373 U.S. 949 (1963).[3]

The Union, as part of its case before the arbitrators, called as a witness one William W. Pezdirtz, a resident of Kansas City, Missouri, to testify to the construction and method of operation of the M.A.N. machine and to give his expert opinion upon the question of the number of journeymen stereotypers required for its safe and efficient operation. Among the witness' qualifications was his employment from 1957 to 1963 as manager of a division of

[3] The circumstances in which an arbitration award may properly be vacated are set down in 9 U.S.C. § 10.

R. Hoe Company, manufacturer of printing presses and allied equipment, and exclusive sales agent in the United States of the German manufacturer of the M.A.N. machine. Upon termination of his employment by Hoe, the witness entered the employment of Wood Newspaper Machinery Corporation which manufactured the Wood Supermatic, a stereotype plate-casting machine competitive with the M.A.N. machine in the United States. The witness had been removed from the Wood payroll as of December 30, 1965, and had agreed with the Union to testify before the Committee under an arrangement made by the Union's counsel with Wood's President by the terms of which the travelling expenses, maintenance while in attendance before the Committee, and loss of earnings from his employment by Wood, would be paid by the Union, in whose behalf he had agreed to testify in the arbitration proceedings. In accordance with that arrangement, the witness was paid $1786.20 by the Union in advance and testified in behalf of the Union throughout the Committee's session of January 12, 1966. The scope of his testimony disclosed in detail, with the use of various exhibits, the parts of the M.A.N. machine and their functions. A suggestion by the Chairman of the Committee that the witness be permitted to examine the M.A.N. machine itself at the Ledger plant was taken under advisement by Ledger's counsel, the Committee hearings were adjourned, and the testimony of the witness was to continue the following day, January 13, 1966. At the opening of that day's session, Ledger's counsel acceded to the Chairman's suggestion that the witness be given an opportunity to inspect the machine at the Ledger plant, but upon being recalled to the stand, the witness stated, responsive to an appropriate question, that he was not prepared to examine the machine at the plant as suggested, or to testify before the Committee on the basis of his findings, because he had no further testimony to give,

and he refused to testify further. In response to a request for a statement of the reason for his refusal to testify further, the witness responded: "That is my own personal reason." The request of counsel for the Union, that the Committee issue subpoenas to certain designated persons for the purpose of ascertaining what might have happened overnight which may have caused the witness not to testify further, elicited the ruling by the majority of the Committee that if counsel insisted upon the testimony of the witness and he continued to refuse, an application should be made to the Court to adjudge the witness in contempt or otherwise to compel the witness' cooperation. The Chairman of the Committee having ruled that the arbitrators had no interest in inquiring why the witness Pezdirtz was refusing to testify further, counsel and the witness appeared before the undersigned Judge of this Court and requested that the Court instruct the Committee to accept the offer of proof by counsel for the Union of the cause of the witness' refusal to continue to testify and to direct the Committee to subpoena before it the persons mentioned in the offer of proof. After hearing argument on the application, the Court concluded that it was without jurisdiction to intervene in the arbitration proceedings or to control the manner in which they were being conducted. After further application to the Committee by counsel for the Union, a majority of the members of the Committee signed and issued subpoenas directed to Pezdirtz, returnable January 14, 1966, and to Peter P. Romano and Daniel McColley (connected with the Wood Company), and to Theodore Newhouse (the controlling stockholder of the Ledger) returnable January 20, 1966.[4] When Pezdirtz resumed the stand in

[4] Pezdirtz was served with a subpoena. The subpoenas directed to Romano, McColley, and Newhouse were never served. The issuance of new subpoenas was not requested by the Union upon the ground that such would be futile.

obedience to his subpoena on January 14, 1966, he reiterated his refusal to testify or to state the reasons for his continued refusal. In response to the Union's request that the Committee inquire into the reason or reasons for the witness' refusal to testify further, the Chairman of the Committee ruled that such inquiry would be irrelevant to the issues submitted to the Committee by the Order to arbitrate. There was ample basis for this ruling, upon the authorities hereinbefore cited. Further efforts by counsel for the Union to make an offer of proof of the reason why the witness had refused to further testify were overruled. The witness having sought an opportunity to confer wth counsel respecting his rights, a five-day recess in the hearing was granted by a majority of the Committee for that purpose, and the witness excused until January 19, 1966. Arrangements were made to permit two journeymen stereotypers to examine the M.A.N. machine at the Ledger's plant to compensate for the refusal of Pezdirtz to do so or to resume his factual and expert testimony.

When the Committee reconvened on January 19, 1966, the attorney for Pezdirtz announced that he had consulted with his client who was then prepared to take the stand and resume his direct testimony. To the inquiry whether the witness was prepared to testify as to why he had refused to testify further, the witness' attorney stated that such testimony had been ruled to be irrelevant. The Chairman of the Committee then directed counsel for the Union to proceed with his questioning of Pezdirtz, but the Union's attorney refused to do so because, as he stated to the Committee, Pezdirtz had declined to familiarize himself with the M.A.N. machine at the Ledger's plant and, under a previous ruling of the Committee Chairman, was incompetent to testify further regarding its structure and operation. Counsel for the Union stated, as a further ground for his refusal to question the witness, that he had

"offered an offer of proof to establish that this witness' original refusal to testify was caused by fear and duress brought about by these defendants and those in cahoots with them, and we have had subpoenas issued for Mr. Theodore Newhouse and for Mr. McColley, the President of the Wood Company, and Mr. Romano of the Wood Company, and to this witness [Pezdirtz] for the purpose of going into that. Now the Committee has ruled that it will not go into this matter, and, therefore, I am not privileged to inquire of this witness why he originally refused to testify or to go into that investigation. In view of these events and in view of the rulings of the Committee, in our view this witness is a spoiled witness, and the quicker he is disposed of the better." Accordingly, counsel for the Union stated that he had no questions to put to the witness Pezdirtz. The Union's attorney did not agree to release Pezdirtz from the subpoena which had been served upon him, lest he be waiving any rights "to raise the question that he raised before, if, as and when an award is rendered here, that the award has been rendered improper because of the duress and fear that had been exerted upon this witness by these defendants and those in conspiracy with them to obstruct and impede the progress of this Committee, and so I may call him as a witness in that eventuality, * * *." Pezdirtz was then excused by the Committee.

ALLEGED FRAUD

The question here is whether the award was procured by corruption, fraud or undue means as contemplated by the provisions of 9 U.S.C. § 10(a). I answer this question in the negative.

My examination of the transcript of the proceedings before the arbitrators, and of the affidavits submitted upon the motion to vacate the award, convinces me that there was no evident partiality or corruption in any of the

arbitrators; that the arbitrators were not guilty of misconduct in any respect; and that there was no other misbehavior by which the rights of either of the parties have been prejudiced. As background to the Union's contention that the award was the result of corruption, fraud or undue means, there is evidence in the record that the Ledger is one of several newspaper publishing corporations controlled through stock ownership by Mr. Newhouse, whose companies were, or had been, equipment customers of the Wood Company. It is also clear upon the record that Newhouse received word that Pezdirtz had become a witness against one of the Newhouse companies in this adversary proceeding. Assuming that the displeasure, if any, of Mr. Newhouse with the activity of Pezdirtz, an employee of the Wood Company serving as an expert witness for the adversary Union, expressed itself in an alleged threat by Newhouse that he would no longer patronize the Wood Company, this is not, in my opinion, evidence which would justify this Court in vacating the pending award. The Union contends however that the attitude of Newhouse toward the employer of Pezdirtz served to deter Pezdirtz from completing the performance of his agreement with the Union to serve as an expert witness in the arbitration proceedings. The merits of the controversy submitted to the arbitrators were not dependent upon the attitude of Newhouse toward the employer of Pezdirtz nor can the award be said to have been procured by corruption, fraud or undue means because Newhouse, learning of Pezdirtz's testimony, had allegedly threatened to deprive the Wood Company of his business, and thereby allegedly prevented Pezdirtz from continuing to serve as an expert witness by the order, or at the request, of his employer. The rejection of the proffer by counsel for the Union of evidence of the reaction of Newhouse to the testimony of Pezdirtz, and the alleged threat of Newhouse to the employer of Pezdirtz did not

deprive the Union of constitutional due process before the Committee (assuming any such constitutional right existed) nor did it deprive the Union of a fair hearing before the Committee. Moreover, the Union may not now be heard to complain of the refusal of Pezdirtz to continue testifying since his subsequent offer to do so was rejected by counsel for the Union.

COMMITTEE'S AUTHORITY

A further ground urged by the Union for vacation of the award is to be found in the Union's contention that the employer did not have inherent authority to determine how many men should be assigned to man the M.A.N. machine. It is asserted by the Union that, in determining that the employer had such right, the Committee exceeded the appropriate scope of its adjudication. It is conceded that the arbitrators determined that only one man was required for the proper operation of the M.A.N. machine. That constituted the resolution, supported by substantial evidence, of the question submitted to arbitration. I find no basis in that regard upon which I could conclude that the arbitrators either exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

Because I find no basis in the record before me disclosing any of the grounds set forth in 9 U.S.C. § 10 to justify the vacation of the award, the motion to vacate the same is denied and the motion of the defendants to confirm the same is granted.

Let an Order in conformity with the foregoing Opinion be presented.

REYNIER J. WORTENDYKE, JR.
Judge, United States District Court

Order and Judgment of District Court

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action

File No. 1186-65

Plaintiff having served and filed a motion applying to this Court pursuant to Section 301 of the Labor Management Relations Act, and 9 U.S.C. § 10 for an order vacating as a matter of law the arbitration award of the Joint Standing Committee (hereinafter the "Committee") dated and filed June 30, 1966 on the grounds that (a) a majority of the Committee were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy before it and other misbehavior by which the rights of plaintiff were prejudiced, (b) the award was procured by corruption, fraud and undue means, and (c) a majority of the Committee exceeded their powers in deciding questions not submitted to them and previously decided by this Court; and plaintiff having in the alternative applied to the Court for an order directing a full inquiry, requiring the attendance of material witnesses, concerning the question as to whether or not the award was procured by corruption, fraud and undue means in that allegedly a witness called by plaintiff in the arbitration proceeding was allegedly tampered with and induced to refuse to testify by defendants; and defendants having cross-moved for an order confirming the award and directing that judgment be entered thereon; and both motions having come on to be heard on October 10, 1966, and Thomas L. Morrissey, Esq. of the firm of Carpenter, Bennett & Morrissey, attorneys for plaintiff, having appeared and argued in support of plaintiff's motion, and Donald A. Robinson, Esq. of the firm of Shanley &

Fisher, attorneys for defendants, having appeared and argued in support of defendants' cross-motion, and the Court having considered the affidavits filed in support of and in opposition to the respective motions, and the stenographic transcripts of the proceedings before the Committee, and of the oral argument of the motions; and due deliberation having been had thereon and upon filing the opinion of this Court on December 19, 1966, it is

ORDERED, that plaintiff's motion for an order vacating the award, and in the alternative for an order directing a full inquiry into the issues of alleged fraud and alleged witness tampering, be and they are denied in all respects; and it is further

ORDERED, that defendants' motion for an order confirming the award be and is hereby in all respects granted; and it is further

ORDERED, that defendants have judgment upon the award and that the award be entered as a judgment of this Court.

Dated: Newark, New Jersey
February 6, 1967

REYNIER J. WORTENDYKE, JR.
U.S.D.J.

The foregoing Order is approved
as to form.

CARPENTER, BENNETT & MORRISSEY
Attorneys for plaintiff

By Thomas L. Morrissey
THOMAS L. MORRISSEY
A Member of the Firm

Stipulation

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,571

NEWARK STEREOTYPERS' UNION No. 18,

Appellant,

vs.

NEWARK MORNING LEDGER CO., AND NEWARK NEWSPAPER PUBLISHERS' ASSOCIATION,

Respondents.

IT IS HEREBY STIPULATED AND AGREED by the undersigned attorneys for the respective parties herein that, in connection with the petition of Newark Stereotypers' Union No. 18 to the United States Supreme Court for a writ of certiorari to the United States Court of Appeals for the Third Circuit in this case, the appendices and proceedings in this Court may be filed as the record on appeal in the United States Supreme Court.

Dated: August 6, 1968

WILLIAM R. MEAGHER,
Attorney for Appellant.

SAMUEL D. SLADE,
Attorney for Respondents.

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IN THE

Supreme Court of the United States

October Term, 1968.

No. 498.

NEWARK STEREOTYPERS' UNION NO. 18,
Petitioner,

v.

NEWARK MORNING LEDGER CO. and NEWARK NEWSPAPER PUBLISHERS' ASSOCIATION,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 498.

NEWARK STEREOTYPERS' UNION NO. 18,
Petitioner,

v.

NEWARK MORNING LEDGER CO. AND NEWARK NEWSPAPER PUBLISHERS' ASSOCIATION,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit (4A-13A) is not yet reported. The opinion of the United States District Court for the District of New Jersey (15A-27A) is reported at 261 F. Supp. 832.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 18, 1968 (14A). The Petition for a Writ of Certiorari was filed on September 10, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the petitioning union can complain that it was deprived of its witness in an arbitration proceeding when it appears that, after a temporary refusal to testify, the witness was willing to continue his testimony and petitioner refused to continue questioning him.

2. Whether an arbitration panel was guilty of misconduct under Section 10(c) of the United States Arbitration Act because it limited the hearing before it to evidence bearing on the arbitrable issue and deferred a hearing upon a charge of witness intimidation to the district court proceeding available under the statute.

3. Whether, in a hearing on motion to vacate an arbitration award under Section 10(c) of the Arbitration Act, a charge of witness intimidation during the arbitration proceeding creates a duty in the district court to order a further hearing where the party making the charge was advised nine months earlier by both district court and arbitrator of its right to subpoena witnesses and take depositions and that party took no steps to obtain any evidence in support of its charge but, rather, simply renewed the charge on the basis of affidavits filed by its attorneys.

STATUTE INVOLVED.

Section 10 of the United States Arbitration Act, 61 Stat. 669, 9 U. S. C. § 10, provides in pertinent part:

> "In either of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> "(a) Where the award was procured by corruption, fraud, or undue means.
>
> • • • •
>
> "(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced."

STATEMENT OF THE CASE.

A. The Nature of the Dispute and the Award.

In connection with the construction of its new newspaper plant, designed to take maximum advantage of fully automatic machinery, the Newark Morning Ledger Co., respondent herein, installed the M. A. N. stereotype plate-casting machine, intended for operation by one man.[1] Different types of competitive stereotype plate-casting machines, such as the Wood Supermatic, are operated by two men, and older types of machines by as many as four men.

Petitioner, Newark Stereotypers' Union No. 18, contended that the M. A. M. machine must be manned by more than one man as in the case of other stereotype plate-casting machines and, to resolve this dispute, an arbitration hearing took place. The arbitration panel consisted of two representatives of petitioner, two representatives of respondent, and a chairman appointed by the district court on petition of the parties (5a-6a, 150a).[2] The collective bargaining agreement in effect between petitioner and respondent empowered this panel to "* * * interpret any

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1. The short name applied to the machine is derived from the name of the manufacturer, the Machinen-Fabriken, Augsburg, Nuremberg, Germany.

2. The letter "A" will be used herein to refer to the appendix to the petition for certiorari. The designation "a" and "c" are used to refer to petitioner's appendices as filed in the court below and certified to this Court. The designation "b" is used to refer to respondent's appendices as filed in the court below and certified to this Court.

Respondent's "Statement" will rest principally on respondent's appendices since those appendices set forth fully the necessary excerpts from the proceeding before the arbitration panel. The appendices filed by petitioner consist mainly of affidavits by its attorneys which, while quoting some of the testimony before the arbitration panel, consist, in large measure, of accusations and conclusions by the affiants.

of the terms or conditions of this contract * * *" and provided, further, that all "* * * majority decisions of the [panel] shall be final and binding upon both parties * * *" (149a-150a).

Hearings before the arbitration panel began on January 4, 1966 and were concluded on February 18, 1966 (97a). This extensive hearing resulted in a transcript of 3,467 pages and the introduction of over 100 exhibits (97a). Following the completion of the hearing, briefs were submitted to the arbitration panel by the parties April 14, 1966 and, on June 30, 1966, the arbitration panel issued its 31 page decision and award (7a-39a).

On review of the full record, the arbitration panel rejected petitioner's contention that the new M. A. N. machine must be manned by more than one man as is the case with competitive stereotype plate-casting machines manufactured by the Wood Newspaper Machinery Corporation. To the contrary, the panel concluded (25a, 29a-31a):

> "Safety and efficiency in one-man operation of this fully-automated M. A. N. plate-casting and finishing machine has been put beyond question by almost a decade of experience in the United States. * * *"
>
> * * *
>
> "As observed supra, the one-man operation of the latest model of the M. A. N. machine has had unquestioned success throughout the United States. It is a fully automated one-man mechanical contrivance, tried and proved by operative experience (3291, 3292). And there has been one-man operation of older models of the M. A. N. in the United States (3321); in Louisville (1501), Portland (3292), Oklahoma City (2206, 2233, 2234, 2235), Birmingham (2005 et seq.), Syracuse (2179, 2180), Orlando (3292), and Los Angeles (2206).

"An acknowledged expert on the design and function of the M. A. N. machine, Carl Ringe, demonstrated its fitness to serve the Star-Ledger's needs (2733), the latest model embodying the new use of an old casting principle for manufacturing stereotype plates, the only machine having the feature known as automatic die casting (2749, 2751-2, 2753, 2754). The uniqueness is in casting under pressure in a totally closed mold (2753, 2754). The new features of the M. A. N. produce a plate of higher body density, homogeneously solid, without pores and holes that weaken the strength of the plate (2752, 2753, et seq.). The result is that the M. A. N. plates have a higher resistance against breaking than the conventional Wood machines. A test by the witness, Ringe, proved that the M. A. N. plates are 'dead solid,' whereas the Wood plates are full of holes (2755).

"And there was corroborating evidence by three experienced foremen who are also experienced operators. They found safety and efficiency in the operation of four M. A. N.s in Birmingham, Oklahoma City and Syracuse. In those three cities alone, 49 different stereotypers, all Union members (18 men in Birmingham) (2001), 18 men in Oklahoma City (2209), and 13 men in Syracuse (2179), have operated their M. A. N. machines alone for 4½ years in Birmingham (2005), 5 years in Oklahoma City (2202), and a year in Syracuse (2168); and in all those years involving all those one-man operations, there was but one injury, to the finger of George Davis (2565-2568), a minor bruise that kept him from his work one hour for first-aid treatment.

"The 'most experienced' stereotype operator of the M. A. N., Bobby J. Hardy of Oklahoma City, who

had operated four M. A. N. machines alone, advised the Oklahoma City management that such one-man operation was sufficient, and the operation and production results of the one-man operation were such that the reassured Oklahoma management five years later purchased a second M. A. N. which has likewise had one-man operation (2203-4; 2233-4; 2234-5)."[3]

B. The Challenge to the Award.

Petitioner moved to vacate the award on the basis of Section 10 of the United States Arbitration Act, 9 U. S. C. § 10, *supra*, p. 2, contending that, first, the arbitration panel was guilty of misconduct in refusing to hear evidence material to the controversy and that, second, the award was procured by corruption, fraud and undue means (40a-41a). The challenge was based solely on events which occurred during the testimony of Pezdirtz, an expert witness called by petitioner. Pezdirtz began his testimony early in the proceedings, on January 12, 1966, and, in his initial testimony, stated that he was not employed, his last employer having been the Wood Newspaper Machinery Corporation (1b). Upon further examination, he testified that he had been taken off the Wood payroll as of December 30, 1965, by reason of his appearance in the arbitration proceeding as an expert witness (3b-4b).

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3. The arbitration panel recognized that the collective bargaining agreement, by Section 29, anticipated and provided for the installation of new automated processes in the stereotyping rooms (11a). That section provides that, where the installation of such new automated equipment reduces the number of regular situation holders, "* * * a program of normal attrition will be followed * * *"; that a list of regular situation holders will be prepared and that the employes on that list will be continued in employment but need not be replaced upon termination of employment by reason of death, retirement or voluntary leaving (11a). Thus, by virtue of this provision, there is no loss of presently held jobs involved in this proceeding.

Pezdirtz stated his qualifications which included an earlier employment with the New York distributor of the M. A. N. plate-casting machine, and proceeded to testify at length with respect to the operation of that machine (4b-5b). At the close of the day, the chairman of the arbitration panel stated that Pezdirtz should be given a chance to acquaint himself with the actual operation of the M. A. N. machine installed in respondent's plant and that was arranged (10b). Upon resuming the stand the following morning, Pezdirtz refused to testify further, stating that his refusal was for his "* * * own personal reason" (11b). In the ensuing discussion, counsel for petitioner took the position that subpoenas should issue to Mr. McColley, the president of the Wood Machinery Corporation and to Mr. Peter Romano, an employe of the Wood Machinery Corporation, for the purpose "* * * of inquiring as to whether or not anybody is in contempt of this Committee * * *" (14b). To this, the chairman replied that counsel could apply to the district court for a remedy and that the arbitration panel was limited to the inquiry which had been assigned by order of the district court (14b). After further discussion, the chairman inquired of counsel for petitioner whether he moved "* * * that the witness be held in contempt * * *" to which counsel replied "No, sir" (17b). Counsel for petitioner then moved "* * * that the Committee inquire as part of its function, because this is a question that the Committee ought to resolve, whether its function as a quasi-judicial committee is being frustrated by any outside influence" (17b).

The panel took the matter under advisement and concluded that counsel for petitioner could make an application to the district judge for an order holding Pezdirtz in contempt or an order directing Pezdirtz to resume his testimony (17b). Counsel for petitioner took the position

that Pezdirtz was no longer his witness but was "* * * a witness before this Committee * * *" and that the arbitration panel should investigate the refusal to testify (18b). He insisted that the matter was one for the panel to which the chairman replied that Pezdirtz was petitioner's witness and that counsel for petitioner must decide what he wanted to do (18b).

Counsel for petitioner then requested, and was granted, a recess to permit the parties to apply to the district judge for instructions "* * * as to whether or not this Committee should proceed to inquire into the reasons for Mr. Pezdirtz's refusal to testify * * *" (20b).

Appearing before the district judge in chambers (23b-60b), counsel for petitioner repeated the charge that he had information, which he characterized as "* * * hearsay * * *", as to the reason for the refusal of Pezdirtz to testify (27b). Counsel for petitioner then stated that he wished to make an offer of proof before the district judge to "* * * spread on the record what I have been told is the reason for this sudden turnabout." (29b). After some discussion as to this offer of proof (33b-41b), counsel for petitioner argued that the district court should, at that point, subpoena witnesses to testify with respect to the refusal of Pezdirtz to go on, stressing that he desired to "* * * prove or disprove those charges * * *" and that he desired the opportunity to do so immediately rather than upon review of an adverse award (43b).

The district judge expressed the view that, as a personal matter, he would be relieved if this "* * * matter of innuendo * * *" could be put at rest but, on the precise question before him, took the position that interim interference with the arbitration proceeding was not proper (34b, 42b, 46b-47b, 51b-52b). He concluded that he had no jurisdiction "* * * to intrude upon the arbitration proceedings prior to their completion and a resulting award."

(56b, 58b-59b). He directed the attention of counsel for petitioner to the statutory remedy by way of review and specifically pointed out that, in proceedings to set aside awards, application could be made to the court for taking the depositions of desired witnesses (58b-60b). When the hearing before the arbitration panel was resumed, there was further discussion of the matter and the chairman again stated to counsel for petitioner that the inquiry which the latter demanded was not relevant to the issue before the arbitration panel and that, to support the charges made in an attack upon any award, the testimony of desired witnesses would not be lost, since his deposition could later be taken (81b).

On the following day, January 14, an attorney representing Pezdirtz, who had appeared pursuant to a subpoena, requested an extension of time until January 19, in order that Pezdirtz could confer with him on the problem (81b-83b). During the interval, petitioner obtained permission for two other witnesses to examine the M. A. N. machine and to testify (83b-85b).

On January 19, counsel for Pezdirtz appeared and stated that Pezdirtz, after consultation, was prepared to take the stand "* * * and resume his direct testimony." (85b-86b). Counsel for petitioner insisted on knowing whether Pezdirtz would testify as to the reasons for his prior refusal (86b). The witness took the stand and counsel for petitioner refused to proceed with any direct examination (87b). He insisted that, in the light of the ruling that he could not inquire into the causes of Pezdirtz's earlier refusal to testify, the witness was "* * * a spoiled witness and the quicker he is disposed of the better." (89b). Counsel for petitioner declined to take any position whether Pezdirtz should remain under subpoena, contending that the arbitration panel had issued the subpoena and would have to decide that question (91b-92b).

Further discussion took place between the chairman and counsel for petitioner and the latter reiterated his refusal to continue to question Pezdirtz with respect to the merits of the controversy and again insisted that the witness would have to be excused by the panel since he was no longer the petitioner's witness (93b-94b). Pezdirtz was excused by unanimous vote of the Committee (94b).

C. Proceedings in the District Court.

In support of its motion to vacate the award under Section 10 of the United States Arbitration Act, petitioner filed an affidavit by counsel which charged that Theodore Newhouse, purchasing agent for respondent, had telephoned Peter Romano of the Wood Company on January 12, 1966, and had stated that "* * * the Newhouse chain was finished with Wood * * *" after ascertaining that Pezdirtz was an employe of the Wood Company and had been given leave of absence for the purpose of testifying on behalf of petitioner (62a-63a). Another affidavit to the same effect was filed by a second attorney for petitioner (90a-91a).

In support of its motion to confirm the award (94a), respondent filed affidavits by both Theodore Newhouse and Peter Romano. Both affidavits denied that any threat was made during the course of the conversation between the two men (11a-113a, 114a-116a). The affidavit of Theodore Newhouse made plain that, when Pezdirtz testified that he was not employed, counsel for respondent had requested Newhouse to obtain data about Pezdirtz's employment with the Wood Company for the purpose of obtaining information for cross-examination (112a). Newhouse freely admitted that he was upset about Pezdirtz's testimony before the arbitration panel that he no longer was employed by the Wood Company when the fact was otherwise (111a-112a).

The hearing on the motions to confirm and to vacate took place before the district judge on October 10, 1966. Counsel for petitioner took the position that, on the basis of the affidavits, it could be concluded that the arbitration panel was guilty of misconduct within the meaning of the statute and that the award should be set aside (95b-96b). Near the close of his oral argument in support of the motion to vacate, counsel for petitioner asked the district court "* * * to proceed to have an exhaustive inquiry * * *" in which those accused by petitioner would be placed under oath to determine whether the "* * * arbitration award was born of a fraud * * *" (96b-97b).

On February 6, 1967, the district court issued an opinion and order, confirming the arbitration award. First, the court adverted to the numerous clear authorities which hold that the function of the court, in reviewing arbitration awards, is severely limited, and does not involve an examination of the award for alleged mistakes of law or erroneous evaluation of evidence (153a-155a). The court specifically noted the standards of review set forth in Section 10 of the Arbitration Act. *Supra*, p. 2.

After reviewing in detail the allegations with respect to the charge of witness-tampering, the district court concluded that there was no showing that the arbitration panel was guilty of misconduct in any respect and that there was no other misbehavior by which the rights of the parties had been prejudiced (160a-161a). The judge analyzed in detail the affidavits submitted by the parties and concluded that, even if it were to be assumed that Theodore Newhouse had expressed displeasure upon learning that Pezdirtz was, in fact, an employe of Wood, that expression of displeasure did not justify setting the award aside (160a-161a). The merits of the controversy sent to arbitration did not depend on the attitude of Newhouse toward Wood or the alleged decision of Wood, after learning that

Newhouse was angered, to order Pezdirtz not to testify, and the decision of the arbitration panel not to go into this charge did not, the district judge held, deprive petitioner of a fair hearing.

Finally, the district judge held that petitioner might not now "* * * be heard to complain of the refusal of Pezdirtz to continue testifying since his subsequent offer to do so was rejected by counsel for the Union" (162a).

D. The Decision of the Court Below.

After describing the procedure which preceded the arbitration award, the court below first held that there was "* * * ample evidence * * *" to support the award of the arbitration panel (6A). The opinion then noted that the essential ground upon which petitioner challenged the award was the refusal of the arbitration panel to investigate its claim that respondent had intimidated Pezdirtz (6A).

The court below then set forth the details with respect to the Pezdirtz incident, and the refusal of counsel for petitioner to proceed with the examination of Pezdirtz after the latter had resumed the stand and had stated his willingness to go forward with his testimony (7A-8A).

The court below then turned to consideration of those provisions of the Arbitration Act here involved, namely, Section 10(a) which empowers the district court to vacate an award where "* * * the award was procured by corruption, fraud, or undue means * * *" and Section 10(c) which provides for vacating an award where "* * * the arbitrators were guilty of misconduct in refusing to * * * hear evidence pertinent and material to the controversy; * * *". The court noted that the existence of the stated grounds upon which arbitration awards could be set aside was clearly not intended to destroy the effectiveness of the arbitration process, nor to increase the power of the courts to re-

examine awards (10A). The opinion points out that a contrary holding would defeat the primary purpose of arbitration, a purpose which has been underscored, in connection with labor disputes, by recent decisions of the Supreme Court in the **Warrior** trilogy (10A).

The court next stated that there was no possible question of "corruption, fraud or undue means" under Section 10(a) since the arbitration panel was fully aware of the circumstances with respect to Pezdirtz's testimony and had made a conscious judgment that the panel itself should not undertake an investigation of petitioner's charge (10A-11A). The only remaining question therefore was whether this decision of the arbitration panel could be condemned under Section 10(c) as "misconduct in refusing to hear evidence pertinent and material to the controversy" with resultant prejudice to a party's rights (11A).

The opinion recognized that a literal construction of Section 10(c) might place the court in the position of having to review all rulings by arbitrators excluding evidence, but concluded that the statute could not reasonably be so read (11A). The court remarked in passing that, even in a court case, evidence of an attempt to persuade a witness not to testify was only admissible as the basis of a possible inference that the litigant believed his own case to be weak (an inference which the court stated petitioner had not claimed in this case (12A)), that, moreover, the exclusion of evidence to this effect would not constitute reversible error unless it could be shown that the exclusion was of substantial harm to a party whose witness was approached (11A). The court below went on to point out that, in review of arbitration awards, the court was not intended to "* * * comb the record for technical errors in the receipt or rejection of evidence * * *" (11A). In this case, the court below emphasized, there could be no basis for a holding that the refusal of the panel to conduct an investigation into the

causes of Pezdirtz's refusal to testify was decisive or harmful "* * * in the light of the other evidence in the case" (12A). The opinion then goes on to recount the fact that the hearing continued for more than four weeks after the Pezdirtz incident, that petitioner presented the testimony of two other expert stereotypers and cross-examined experts offered by respondent; and that, during the same four-week period, petitioner had ample opportunity to procure other evidence if it deemed it necessary to do so (12A). Finally, the court emphasized the fundamental fact that counsel for petitioner having refused to examine Pezdirtz when the latter announced his readiness to go forward, he could not now assert as a fact that Pezdirtz would not have testified in petitioner's favor (12A). The court below specifically stated that petitioner "* * * could not by its own conduct make the effort it attributed to the company successful and then protest at the success * * *" (12A). In view of the position petitioner took before the arbitration panel, the court did not feel called upon to discuss the possible courses of action which counsel for petitioner might have followed if in continuing the examination of Pezdirtz, he had been surprised by adverse, instead of favorable testimony from Pezdirtz. In these circumstances, the court below held that it was enough that petitioner was afforded ample opportunity to have the testimony but refused to accept it.

Finally, the court below again emphasized the arbitration proceeding as a whole, noted that the arbitration panel had no general investigatory function, and held that the "* * * vindication of the integrity of the proceedings * * *" which petitioner was calling for had no real effect on the question whether petitioner was accorded a fair hearing on the factual issue as to the one-man operation of the M. A. N. machine, that an award will not be vacated because of an erroneous ruling of arbitrators which does not affect the fairness of the proceeding as a whole (13A).

ARGUMENT.

After an extensive hearing, an arbitration panel resolved the dispute between petitioner and respondent as to the manning of the M. A. N. stereotype plate-casting machine, concluding that one-man operation of the machine had been shown beyond question to be safe and efficient. Both courts below held that the record before the arbitration panel fully supported the award and, in fact, there is no challenge here on that point. Both courts below also gave patient consideration to petitioner's charges that it had been denied a fair hearing and a day in court—the charges now repeated by petitioner before this Court—and found them to be without substance.

We submit that the decisions below are clearly correct and that this case presents no question which warrants review by this Court.

1. *The Proceeding Before the Arbitration Panel.* The incident on which petitioner bases its complaints occurred early in the arbitration proceeding when Pezdirtz, offered by petitioner as an expert, gave what the court below described as "disingenuous" testimony to the effect that he was currently unemployed (9A). When questioning was later resumed on this subject, Pezdirtz qualified his answer, to some extent, by stating that he had recently been released from the payroll of the Wood Newspaper Machinery Corporation because of his coming to give his opinion before the arbitration panel. Wood manufactures a plate-casting machine, sold in competition with the M. A. N. machine, which requires two men for its operation.[4]

4. No further disclosure by petitioner was made as to the nature of its arrangement with Pezdirtz and Wood until long after the arbitration proceeding had closed. The actual nature of that arrangement was shown for the first time in connection with petitioner's motion to vacate the arbitration award, filed on September 12, 1966 (45a).

On the basis of this curious testimony, counsel for respondent requested Theodore Newhouse, purchasing agent for respondent, to inquire of Wood as to the actual status of Pezdirtz, so that the information could be used in cross-examination. *Supra,* p. 10. It is obvious that whatever testimony Pezdirtz gave would have been substantially weakened by a showing that he was, in fact, a salesman for a competing machine which called for a two-man operation.

All this took place on January 12, 1966. On the following morning, Pezdirtz took the stand and refused to testify further for "* * * personal reasons * * *" (11b). At this point, counsel for petitioner called upon the arbitration panel to interrupt its consideration of the merits of the dispute between the parties and conduct a separate inquiry, seemingly in the nature of a quasi-criminal investigation, into the reasons for Pezdirtz's refusal to testify. *Supra,* p. 7. After considerable discussion, the panel ruled that such ancillary investigation was not part of its function, but granted a recess so that the question could be presented to the district judge in chambers.

The district judge properly declined to interrupt the arbitration proceedings before final award. Once a dispute is held to be arbitrable, the "* * * last deliberative action of the court is the appointment of the arbitrators, who thereupon take over the controversy and dispose of it * * *" subject only to "* * * possible disturbance * * *" on a motion to vacate the award. See **Compania Panemena Maritima v. J. E. Hurley Lbr. Co.**, 244 F. 2d 286, 289 (2d Cir. 1957).[5] The district judge went on to point out to

5. See also **Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corporation**, 274 F. 2d 805 (2nd Cir. 1960); **San Martine Compania de Nav. v. Saguenay Term. Ltd.**, 293 F. 2d 796, 800-802 (9th Cir. 1961); **Orion Ship. & Trad. Co. v. Eastern States Petroleum Corp.**, 312 F. 2d 299, 300 (2nd Cir. 1963).

counsel for petitioner that ample opportunity would be available for presenting his charges in connection with any review proceedings, that, at that time, counsel for petitioner could subpoena witnesses, take depositions, and carry out whatever other measures were thought to be necessary to attempt to establish the charges of witness-tampering which, by the admission of counsel for petitioner, were then based on "hearsay". *Supra,* p. 19.

When the parties returned to the arbitration hearing on the same day, the chairman of the panel again emphasized to counsel for petitioner that he had ample opportunity to attempt to substantiate his charges of witness-tampering by calling witnesses in connection with a statutory review proceeding in the event of an unfavorable award.

Even if the matter rested here, no basis for setting aside the award would have been established. As the court below observed (11A), an attempt to suppress evidence, even in a proceeding in court, gives rise, at best, to a possible inference of weakness in the case of the party who attempts the suppression,[6] an inference, however, which petitioner has not claimed in this case. Even had the inference been claimed here, it is clear that it need not be drawn and is not necessarily the basis for reversal in the absence of a demonstration that the suppressed testimony actually damaged the complainant's case. In the context of review of an arbitration award under the "misconduct" language of Section 10(c) of the Arbitration Act, bearing in mind that arbitrators are often laymen and not

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6. The inference is *prima facie* only and does not prevail against proof that the party believes in his own case and that his case is not weak. It was early observed that the inference "* * * does not always follow * * *", **Moriarty v. R. Co.**, L. R. 5 Q. B. 319 (1870) and that it was "* * * not to be pressed too urgently". **Com. v. Webster**, 5 Cush. 295 (1850).

lawyers, the court below properly noted that it was not the function of the reviewing tribunal to "* * * comb the record for technical errors * * *" (11A).[7] Rather, in such circumstance, the reviewing court must determine whether this arbitrator's ruling was so serious as to amount to the deprivation of a fair hearing. Here, on the whole record, the court below held (12A):

> "Even if full play is given to the inference that a party's effort to suppress the testimony of a witness indicates a weakness or lack of merit in his position, it must be recognized that the arbitrators here considered all of the other evidence which was presented to them by both sides on the merits of the issue whether the machine required more than one operator. While the suppression of evidence, if it occurred, may have had evidential value it cannot be said as a matter of law that it was decisive or that its exclusion was seriously harmful in the light of the other evidence in the case."

But, in any event, the matter did not rest at this point. After consultation with an attorney during a recess granted by the arbitration panel for that purpose, Pezdirtz resumed the stand and expressed his willingness to continue with his testimony. *Supra,* p. 9. Counsel for petitioner was adamant in his refusal to question Pezdirtz at all. As the court below suggests without elaboration (12A), a variety of steps were then available to counsel for petitioner. He could have requested a short recess, discussed with Pezdirtz the nature of the testimony which Pezdirtz would give, and decided on that basis whether to go forward. He could

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7. It is well established that arbitrators are not bound by rules of evidence. **Bernhardt v. Polygraphic Co.**, 350 U. S. 198, 205 (1956); **Brotherhood of Railroad Trainmen v. St. Louis Southwestern Ry. Co.**, 252 F. Supp. 961, 962 (D. D. C. 1966).

have questioned Pezdirtz and, in the event of hostile testimony, pleaded surprise and examined Pezdirtz as on cross-examination on the basis of prior conversations with the witness. Counsel for petitioner did none of these things but insisted on treating the incident as closed, reiterating unsubstantiated charges that the witness was "spoiled" and that respondent was guilty of witness-tampering.

Counsel for petitioner argues that the refusal of Pezdirtz to go forward was justified on the ground that proceeding with the witness would have constituted a waiver, on a motion to vacate the award, of the charges of witness-tampering. This argument is plainly without force. If Pezdirtz had continued to give the testimony which petitioner expected, petitioner would have had no ground for complaint. Parenthetically, in that case, Pezdirtz could have been cross-examined as to his employment by the Wood Company. If Pezdirtz had given hostile testimony, no waiver could have occurred since counsel for petitioner could have continued to press the attempt to substantiate its charges on a motion to vacate an adverse award. The fact is that counsel for petitioner was unwilling "* * * to accept or even test * * *" the witness (12A).

In other words, insofar as the arbitration proceeding is concerned, petitioner's sole complaint is that the panel declined to depart from consideration of the merits of the dispute before it, the question which had been referred to it for solution by the district court. Counsel for petitioner had been advised by the district judge in chambers and by the chairman of the arbitration panel as to the appropriate manner in which to preserve, and attempt to prove, the charges of witness-tampering.

There is thus no basis for petitioner's charge that the arbitration panel engaged in an "* * * obstructive prevention * * *" of petitioner's asserted right to inquire, that the arbitrator's rulings created "* * * a series of pit-

falls * * *", or that any action on the part of the arbitration panel "* * * completely foreclosed * * *" petitioner "* * * from having its day in court on the issue of witness-tampering * * *". (Pet., pp. 8, 11, 16). To the contrary, the arbitration panel properly confined itself to the submission, holding the independent investigation which petitioner demanded as not to be within that submission, and confirming the instruction of the district judge that ample opportunity would be afforded to petitioner, on a motion to vacate the award, to support its charges.

2. *The Review Proceeding.* The arbitration award was filed on June 20, 1966. Petitioner's motion to vacate that award was filed on September 12, 1966. The hearing on petitioner's motion to vacate and respondent's motion to affirm the arbitration award took place on September 10, 1966. During this entire interval, petitioner made no effort to obtain a court order, readily available, to take the deposition of Pezdirtz, nor did petitioner request the issuance of subpoenas to Theodore Newhouse or to any officer of the Wood Company. As mentioned above, *supra*, p. 9, petitioner was advised on January 13 by both the district court and the arbitrator of its right to subpoena witnesses, take depositions, and do whatever else it felt was necessary in an attempt to obtain evidence to support this charge of witness-tampering. In fact, as noted by the district court (160a), counsel for petitioner specifically stated that, in an attack upon an unfavorable award, he would probably call Pezdirtz as a witness (92b).

Petitioner's motion to vacate the award was based principally on two affidavits by its attorneys which consisted of a number of excerpts from the testimony before the arbitration panel, and hearsay charges as to the telephone conversation between Newhouse and Peter Romano, a Wood Company officer, on the day when Newhouse was

attempting to ascertain the exact employment status of Pezdirtz. Petitioner's affidavits charged that Newhouse had threatened the Wood Company. Affidavits filed by Newhouse and Romano, the actual parties to the telephone conversations in question, denied this. Newhouse freely admitted that he was disturbed when he discovered the actual nature of the arrangement but he unequivocably swore that he had made no threats. Romano confirmed this statement.

It was on this basis that the matter went to final hearing in the district court with petitioner contending that, on the basis of the affidavits alone, the award should be vacated. Here again, it apparently rejected the suggestion that it could take the deposition of Pezdirtz, Newhouse, Romano, or anyone else it pleased. In the district court's opinion, the district court carefully analyzed the conflicting affidavits, pointing out that they fell far short of substantiating any charge of witness-tampering (25A-26A). The district court observed that the displeasure of Newhouse with the arrangement which Wood had made with petitioner had little to do with the controversy which had been submitted for arbitration and could not be called "* * * corrupt, fraud or undue means * * *" within the meaning of Section 10(a) of the Arbitration Act (26A). It was not until the oral argument on the respective motions to vacate and to affirm the award, that petitioner requested that a further investigation take place, that the district court schedule "* * * an exhaustive inquiry * * *", calling witness to determine whether the "arbitration award was born of a fraud * * *," (96b-97b). As indicated above, petitioner has taken advantage of none of the procedures, *e.g.*, depositions, available to it, prior to oral argument, in support of its motion.

In other words, petitioner, advised as early as January 12, 1966, as to the course to be followed in connection with producing witnesses in support of its charges in any review

proceeding, took no steps, gambled on the sufficiency of its attorneys' affidavits, and, where those were feared to be insufficient, demanded an independent investigation into its charges, this time by the district court on the day of final argument on the motions. In these circumstances, there is no justification for the strong language with which petitioner, before this Court, attacks the district court and the court below. Clearly, petitioner had its day in court and, on that day, took none of the indicated steps to substantiate its charges. There is, accordingly, no substance to petitioner's charge that the district court denied to petitioner "* * * the right to produce evidence * * *" or that the district court denied the "* * * [o]pportunity to present such proof * * *" before reaching final decision (Pet., pp. 16, 17). To the contrary, petitioner was afforded every opportunity of substantiating its charges and consciously failed to avail itself of such opportunity.

Thus, even if this case actually presented some question of constitutional due process, that question would only be reached for decision where the record required such decision. **Peters v. Hobby**, 349 U. S. 331, 339 (1955); **Ashwander v. Tennessee Valley Authority**, 297 U. S. 288, 347 (1935). Similarly, the doctrine of exhaustion of remedies would preclude consideration in this case of petitioner's constitutional claims, in view of the actual facts of record. **Aircraft & Diesel Corp. v. Hirsch**, 331 U. S. 752, 767 (1947); **Bustos-Ovalle v. Landon**, 225 F. 2d 878, 880-881 (9th Cir. 1955); **Olinger v. Partridge**, 196 F. 2d 986, 987 (9th Cir. 1952).

But more to the point, there is no proof whatsoever in this case that respondent was guilty of witness-tampering. For this reason, petitioner's reliance on cases such as **Hazel-Atlas Glass Co. v. Hartford Empire Co.**, 322 U. S. 238 (1944) and **Insurance Company of North America of Philadelphia**

v. Hegewald, 161 Ind. 631, 66 N. E. 902 (1903), is entirely misplaced. Both of those cases involve situations where an actual fraud had occurred and had been proved. In **Hazel-Atlas**, the question was whether a federal court, which had placed major reliance on a fraudulently contrived exhibit, could reopen its judgment after the expiration of the term. In **Hegewald**, it was shown that two members of a three-man appraisal panel were actually partisans of one party to the appraisal, without the knowledge of the other party.[8]

Here, contrary to petitioner's reckless statements, there has never been any showing that respondent in any way attempted to suppress or subvert Pezdirtz as a witness. As a matter of common sense, it is clear that respondent, having prepared its case in full in support of its position in the arbitration dispute, would have vastly preferred the opportunity of cross-examining Pezdirtz on the basis of his employment by Wood.

3. *Petitioner's Reliance on the Warrior Trilogy.* Petitioner never makes clear precisely what it means by the "due process" that it claims. Seemingly a "fair hearing" is not enough since petitioner criticizes the court below for having merely held that a "fair hearing" was accorded (Pet., p. 8). And petitioner cannot be heard seriously to contend that it was not afforded ample opportunity to present evidence in connection with its motion to vacate the award. *Supra,* p. 20. On final analysis, petitioner seems to be contending that the importance of arbitration in labor-management relations requires the courts to assume a more searching role in reviewing arbitration awards (Pet., pp. 8-10). Petitioner argues that, by reason of the decision

8. A similar distinction exists as to **Barr Rubber Products Company v. Sun Rubber Company**, 277 F. Supp. 484 (S. D. N. Y. 1967) and **Singer Sewing Machine Co. v. American Safety Table Co.**, 88 F. Supp. 260 (E. D. Pa. 1949).

below, "• • • the powers of arbitrators have been grossly enlarged and those of the courts to review arbitration proceedings and awards have been emasculated" (Pet., p. 10).

Petitioner's reliance on this Court's decisions in the well-known **Warrior trilogy (United Steelworkers v. American Manufacturing Co.**, 363 U. S. 564 (1960) and **United Steelworkers v. Warrior & Gulf Navigation Co.**, 363 U. S. 574 (1960); **United Steelworkers of America v. Enterprise Wheel and Car Corp.**, 363 U. S. 593 (1960)) is misplaced. There is no need to labor the point. Those decisions emphasize the importance to the national labor policy of limiting court participation in the industrial arbitration process to a minimum. **American Manufacturing** and **Warrior** deal with the threshhold situation where arbitration is sought and resisted. If any of these cases has any relevance at all, **Enterprise**, which deals with court review of an award, is the one closest to the point here. In **Enterprise**, this Court said (363 U. S. at p. 596):

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. • • •"

The presence of statutory standards of review under the Arbitration Act does not in any way vary this relationship between arbitrator and court, as the court below recognized (9A-10A). Decisions under Section 10 of the Act have stressed the "• • • severely limited • • •" role of the court in review. **Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corporation**, 274 F. 2d at p. 808. And see cases cited, *supra*, at p. 16.

This view of the limited function of the court in reviewing an arbitration award, running back to the classic statement by this Court in **Burchell v. Marsh, 17 How. 344,** 349-350 (1854), was the principal basis on which the court below rested its decision. The arbitration panel considered all of the evidence before it and the award contained the "* * * honest decision * * *" of the panel on the dispute submitted. **Burchell v. Marsh,** 17 How. at p. 349. And, even accepting the matters of which petitioner complains for testing purposes, the court below found that there was no showing that the award would have been changed (12A). Summing up, the court below stated (13A):

> "Here the union's contention that the arbitration panel should have held an inquiry or investigation for the general purpose of exposing the misconduct of the company was peripheral to the issue of fact which was before the arbitrators for decision. The panel had no general investigatory function, and the union did not claim the benefit of the inference that the company's position on the issue before the panel was weak or unfounded because of an effort to suppress Pezdirtz's testimony. Whatever might have come from the vindication of the integrity of the proceedings would not affect the question whether the union had a fair hearing on the factual issue whether the M. A. N. machine could be safely and efficiently run with one operator. Even if it touched upon the problem to some extent it is not so substantial or pervasive that the award arrived at by the arbitrators after lengthy hearings and the presentation of substantial evidence by both sides long after the Pezdirtz incident had ended must be cast aside as a quasi-judicial product which is tainted either by fraud or misconduct."

CONCLUSION.

The decisions below are clearly correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1968

No. 498

NEWARK STEREOTYPERS' UNION NO. 18,
Petitioner,

v.

NEWARK MORNING LEDGER CO. AND NEWARK NEWSPAPER PUBLISHERS' ASSOCIATION,
Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Preliminary Statement

The petition demonstrates that the refusal of an inquiry into witness tampering by the arbitration panel and the District Court constitutes a denial of petitioner's constitutional right to arbitral and judicial due process warranting review by this Court.

Respondents, in an obvious effort to obtain denial of the petition, attempt to obscure and suppress these important constitutional questions by presenting the case as involving mere matters of procedure which, they claim, justified the denial to petitioner of the hearing it repeatedly sought. Respondents do not even concede that petitioner was entitled to due process. The only reference to due

process in their brief is one "iffy" phrase so obscured as to be easily overlooked (Resp. br., p. 22).

Respondents argue:

1. That petitioner waived its right to an inquiry into witness tampering by the Committee by refusing to proceed with its witness after he had agreed to continue his testimony;

2. That the Committee did not deny but merely "deferred" a hearing on the charge of witness intimidation to the District Court;

3. That the District Court properly denied petitioner a hearing because petitioner "took no steps to obtain any evidence in support of its charge * * *" (Resp. br., p. 2).

These "questions presented" all assume that there was witness tampering, but seek to justify the shocking inaction with regard to it by the arbitration panel and the District Court, by charging petitioner with either waiving its rights or failing to pursue its remedies.

The petition has anticipated and answered the waiver argument (Pet. pp. 13-16). As the petition shows, the arbitration panel did not merely "defer" the hearing upon the witness intimidation charge but repeatedly denied such a hearing in refusing to direct the witness to state the reasons for his refusal to testify, or to accept petitioner's offer of proof that he had been interfered with, or to investigate whether any outside influence was exerted upon the panel. All these matters were ruled "irrelevant".

The only "question" raised by respondents which has not been anticipated and answered by the petition is the claim that the District Court was justified in denying a hearing on the witness tampering issue because petitioner

allegedly failed to take "steps to obtain any evidence in support of its charge . . ." (Resp. br., p. 2). This brief is limited to answering this claim.

Argument

Respondents contend that although petitioner was "advised as early as January 12, 1966" as to the course to be followed in connection with producing witnesses in the event that there was a later hearing in the District Court, petitioner took no steps to prepare for such a hearing by pretrial deposition or the issuance of trial subpoenas (Resp. br., pp. 21-22). In the face of the denial of any hearing by the District Court, respondents make the astounding statement that "petitioner was assured every opportunity of substantiating its charges and consciously failed to avail itself of such opportunity" (Resp. br., p. 22).

The following facts belie these assertions:

1. The award was not filed until June 30, 1966 (39a).

2. Petitioner made its motion to vacate the award within the three-month period prescribed by the United States Arbitration Act (§ 12) on eight affidavits setting forth the facts as known to the affiants regarding the stifling of petitioner's witness and the refusal of the panel to inquire or permit inquiry into those facts (42a-93a).

3. When these affidavits were filed, petitioner did not and could not know what, if any, answering affidavits would be filed or whether any such affidavits would raise triable issues of fact.

4. Upon receipt of respondents' opposing affidavits (111a-132a), which did raise issues of fact, petitioner applied on the oral argument for a hearing to try these issues in the event that the District Court decided that the award

should not be vacated for the failure of the arbitrators to receive, as material and relevant, evidence of witness tampering (24c-29c).

5. Unless such a hearing was granted, petitioner was in no position to invoke pretrial deposition procedures or to issue hearing subpoenas. Rules 26(d), 45(e)(1), Fed. Rules Civ. Proc.

6. In fact, as petitioner's counsel advised the District Court on the oral argument of the motion to vacate the award, petitioner was ready then and there to proceed with a trial of the issue, since a number of its witnesses were present in the courtroom ready to testify (24c-25c).

7. Had a hearing been granted, even the hostile witnesses, namely, Newhouse, Romano and McColley, were within reach of trial subpoenas and could have been brought before the Court at the instance of petitioner, if not voluntarily produced by respondents, without undue delay.

8. The District Judge gave no indication on the oral argument of the motion to vacate the award whether he would grant petitioner the hearing it sought, and did not render his decision until December 19, 1966.

9. It was not until February 6, 1967, when the order and judgment was entered, that petitioner's application for a hearing was denied (28a-29a).

10. Neither the District Court nor the Court of Appeals held that the refusal of any inquiry into the question of witness tampering was justified by what the respondents claim was a failure of petitioner to prepare for the trial of that issue.

Conclusion

Contrary to respondents' contention that "petitioner was afforded every opportunity of substantiating its charges and consciously failed to avail itself of such opportunity" (Resp. br., p. 22), petitioner has been deprived of its constitutional right to a hearing on the vital issue of witness tampering, both before the arbitration panel and in the District Court. Indeed, such a hearing has been opposed at every turn by the respondents, who thus far have been strangely successful in their opposition.

Dated: New York, New York
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Respectfully submitted,

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